SUPREME COURT U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 267

JACK H. KELLY, PETITIONER,

vs.

VINCENT W. KOSUGA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 11, 1958
CERTIORARI GRANTED OCTOBER 13, 1958

SUPREME COURT OF THE UNITED STATES

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[fol. 8] Jack Kelly

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Storage Paid to	Lot #	Car #	Storage Locations	State	Brand	Ordered Out Storage
— 1 10	48521 V	URT 4844	Blue Island	Wisconsin	Endeavor	
— 1 14	48550 V	WRC 14274	V	V	Earth Farms	
— 1 14	48552 V	URT 38141	V	V		
— 12 17	48586 V	WP 93259	V	V		
— 12 17	48585 V	PFE 68503	V	V		
— 12 28	48615 V	URT 38499	V	V	B & B	
— 12 31	48643 V	MOT 10947	V	V	Palmyra	
12 27	H9837	FGE 57659	G Hammond	V		
12 21	H9819	FGE 34846	V	Indiana		
— 1 2	48441	FGE 28912	Blue Island	Michigan		
1 15	H9796	WFE 68014	G Hammond	V		
1 1	H9910	FGE 56527	V	V		
1 2	73273	ART 35048	Central-Sang	Iowa	Pride of Iowa	
— 1 6	48472	WWX 70307	Blue Island	V	Fertile Grown	
12 26	H9856	ART 26101	G Hammond	V		

[fol. 9] EXHIBIT "B" TO COMPLAINT

WESTERN UNION

1956 FEB 16 PM 5 17

nl

JACK KELLY
% KELLY-BLACK CO.
110 N. FRANKLIN ST.
CHICAGO 6, ILL.

STORAGE ONIONS YOU PURCHASED FROM ME ON 12-17-55 NOW SHOWING DETERIORATION. YOU AGREED TO ORDER OUT OF CHICAGO STORAGE AND PAY FOR THESE ONIONS DURING JANUARY AND EARLY FEBRUARY 1956. PRESENT CONDITION OF ONIONS REQUIRE IMMEDIATE ACTION. DEMAND PAYMENT BY 2-20-56 AND WILL SURRENDER NEGOTIABLES UPON RECEIPT OF PAYMENT.

VINCENT KOSUGA

EXHIBIT "C" TO COMPLAINT

VINCENT KOSUGA
110 North Franklin Street
Chicago, Illinois

February 16, 1956

Mr. Jack Kelly
110 North Franklin Street
Chicago, Illinois

Dear Mr. Kelly:

On December 17, 1955, you purchased from me 50 cars of onions in storage at Chicago. As you know, some of these onions had been in storage since November, and are now beginning to show some deterioration.

[fol. 10] It was our agreement that you were to pay $300.00 per car cash, $200.00 per car on or before January 10, 1956, with the balance including all storage charges accrued to be paid when you ordered your onions out of storage. Further, that you would order your onions out of storage in substantial quantities during January and early February, 1956, which you have not done.

In view of the present condition of these onions, it appears that to hold them in storage for any further period of time may result in their total loss. Therefore, I demand payment of the amount due me for these onions on or before February 20, 1956. Upon receipt of payment, I will surrender the negotiable warehouse receipts to you.

Yours very truly,

Vincent Kosuga

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Print

IN THE UNITED STATES COURT OF APPEAL
FOR THE SEVENTH CIRCUIT

22

No. 12,190

26

JACK H. KELLY, Defendant and Appellant,

27

vs.

30

30

VINCENT W. KOSUGA, Plaintiff and Appellee.

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32

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATE
32 FOR THE NORTHERN DISTRICT OF ILLINOIS,
33 EASTERN DIVISION

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1956

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59 1957

60 Mar. 22. Amended answer.

Mar. 22. Motion to strike defense and reply to amend answer.

Mar. 22. Order giving leave to defendant to file amend answer and giving leave to plaintiff to file m tion to strike defense and reply to answer.

Apr. 24. Memorandum opinion on motion to strike affirmative defenses.

Apr. 24. Order granting plaintiff's motion to strike affirmative defenses.

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Aug. 22. Motion for summary judgment and affidavit in support thereof.

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Oct. 22. Notice of appeal.

[fol. 3]

In United States District Court

Complaint—Filed September 11, 1956

Vincent W. Kosuga, plaintiff, by his attorney, Lee A. Freeman, complains of Jack H. Kelly, defendant, and alleges:

1. Plaintiff is a citizen of the State of New York and defendant is a citizen of the State of Illinois. The amount in controversy, exclusive of interest and costs, exceeds $3,000.00.

2. At various times on and prior to December 17, 1955, defendant sought to purchase quantities of onions which were then in store in Chicago, and owned by plaintiff and others. Pursuant thereto, defendant initiated, arranged for and attended meetings with plaintiff to negotiate such purchases.

3. On or about December 17, 1955, defendant purchased from plaintiff and plaintiff sold to defendant, fifty (50) cars of U. S. No. 1 grade Yellow Globe Onions in Chicago storage at $960.00 per car, for a total of $48,000.00, plus storage charges incurred after such sale. The specific cars of onions so purchased were selected by defendant. The terms of said purchase and sale provided for an initial cash payment of $300.00 per car, a second payment by January 10, 1956 of $200.00 per car and the balance of $460.00 per car, plus storage charges incurred, to be paid when the defendant ordered the car of onions to be released from storage. A memorandum of said agreement of purchase and sale is contained in the invoice issued to defendant; a true and correct photostatic copy thereof is attached hereto as Exhibit "A" and by this reference made a part hereof.

4. Defendant has paid to plaintiff the following sums in part payment of said purchase of onions:

On or about December 22, 1955	$7,500.00
On or about January 18, 1956	5,000.00

[fol. 4] Defendant has refused and does refuse to pay the balance due on said purchase price of $48,000.00 (less an allowance of $35.20 for shortage) although plaintiff has made demand therefor.

5. Storage charges in the amount of $5,082.00 have been incurred by plaintiff since the sale of said onions to defendant. Defendant has refused and does refuse to pay said storage charges although plaintiff has made demand therefor.

6. From time to time subsequent to the purchase of said fifty (50) cars of onions, defendant withdrew and sold or utilized thirteen (13) cars of said onions without making payment therefor as was required by defendant's agreement of purchase, although plaintiff has made demand therefor.

7. The onions purchased by defendant are perishable agricultural commodities which may be stored only for a reasonable period of time. On February 16, 1956, plaintiff advised defendant by telegram and letter that the onions so purchased in Chicago storage were showing deterioration and demanded that defendant withdraw said onions from storage and make full payment therefor, including storage charges, as provided by the agreement between the parties. Defendant, while acknowledging his obligations under the agreement, refused to withdraw said onions from storage at that time. True and correct copies of the telegram of February 16, 1956 from plaintiff to defendant, of the letter of February 16, 1956 from plaintiff to defendant and of the telegraphic answer of February 20, 1956 from defendant to plaintiff are attached hereto, marked Exhibits "B", "C" and "D", respectively, and by this reference made a part hereof.

8. On or about March 9, 1956, defendant repudiated his agreement of purchase of said onions. After due notice to defendant, on and after March 19, 1956, plaintiff used his best efforts to mitigate the damages involved by selling and disposing of said onions for the account of defendant, and plaintiff did so sell and dispose of the thirty-seven (37) cars of onions sold to defendant and remaining in storage at the

[fol. 5] best price available. There was realized from the sale of such onions a total sum of $3,204.00, which represented the then fair market value of said onions.

9. There is now due and owing to the plaintiff on account of said purchase and sale of fifty (50) cars of onions, a balance of $37,342.80, computed as follows:

Purchase price of 50 cars @ $960.00 per car		$48,000.00
Less adjustment for shortage		35.20
		$47,964.80
Add storage charges incurred subsequent to sale		5,082.00
Total due		$53,046.80
Less:		
Amount paid by defendant	$12,500.00	
Amount realized by plaintiff in liquidation of onions for account of defendant	3,204.00	15,704.00
Balance due and owing		$37,342.80

Wherefore, plaintiff prays that judgment be entered in his favor and against defendant in the sum of $37,342.80, together with interest at the rate of 5% per annum from the date of demand, and costs of this action.

Vincent W. Kosuga, Plaintiff, By Lee A. Freeman, His Attorney.

Dated: September 10, 1956.

Lee A. Freeman, 105 S. LaSalle Street, An. 3-6939, Chicago, Illinois.

[fol. 6] EXHIBIT "A" TO COMPLAINT

Vincent Kosuga
110 No. Franklin
Chicago, Illinois

Invoice Date Jan. 5, 1956
Refer to Invoice No. (6)

Sold to Jack Kelly
Parma, Michigan

21	Car	Illinois	Onions
11	"	Minn	Onions
11	"	Wisc	"
1	"	Ind.	"
3	"	Mich	"
3	"	Iowa	"
Total 50			

@ 960.00 per car = $48,000.00
Less advance = 7,500.00

$40,500.00

Terms:—(1) Jan 10—$200 more per car due.

(2) Balance due on your order to release from storage.

(3) Storage information on next sheet.

[fol. 7]

Jack Kelly

Page 1

Storage Paid to	Lot #	Car #	Storage Locations	State	Brand
12 31	S-1317		Dakota Chief	Illinois	All American
1 6	S-1329		V	V	
1 2	S-1334		V	V	
1 12	73005		Central-Sang	V	
1 13	73010		V	V	
1 15	73031		V	V	
— 12 20	48287 V		Blue Island	V	
— 12 19	48281 V		V	V	
— 12 18	48253 V		V	V	
— 12 18	48252 V		V	V	
— 12 20	48276 V		V	V	
12 23	S1364		Dakota Chief	V	
12 25	73085		Central-Sang	V	
— 1 2	48321 V		Blue Island	V	
1 10	73157		Central-Sang	V	
— 1 12	48341 V		Blue Island	V	
— 1 13	48346 V		V	V	
1 13	73192		Central-Sang	V	
— 12 17	48374 V		Blue Island	V	
— 1 16	48353 V		V	V	
— 12 17	48367 V		V	V	
— 1 2	48440 V	MOT 10279	V	Minnesota	North Star
— 1 2	48427 V	ART 50912	V	V	Northland
— 1 6	48461 V	WRC 19123	V	V	V
— 1 7	48489 V	ART 18315	V	V	Windmill
1 8	73302	WRC 16042	Central-Sang	V	North Country
1 15	H9792	PFE 47303	G Hammond	V	
— 1 16	48577 V	WRC 18010	Blue Island	V	
12 31	H9890	MDT 2210	G Hammond	V	
— 12 29	48619	MDT 10650	Blue Island	V	Paul Jones
12 31	H-9882	FGE 59027	G Hammond	V	Coronet
— 12 31	48638	WP 93038	Blue Island	V	50# Brand
— 1 2	48432 V	FGE 32267	V	Wisconsin	Yellow Bird
— 1 6	48466 V	URT 38731	V	V	Endeavor
— 1 8	73311	URT 81559	V	V	Delevan

EXHIBIT "D" TO COMPLAINT

WESTERN UNION

TELEGRAM

1956 FEB 20 PM 5 17

CHO 82 PD—CHICAGO ILL 20 452PMC
VINCENT KOSUGA
110 NORTH FRANKLIN ROOM 1210

OUR AGREEMENT DOES NOT PROVIDE THAT ONIONS BE WITHDRAWN FROM STORAGE IN SUBSTANTIAL QUANTITY BY EARLY FEBRUARY. WE INTEND TO ABIDE BY THE ORIGINAL AGREEMENT AND WE EXPECT YOU TO DO LIKEWISE.

JACK KELLY

[fol. 11]

IN UNITED STATES DISTRICT COURT

AMENDED ANSWER—Filed October 19, 1956

Now comes the defendant, Jack H. Kelly, by his attorney, Joseph W. Louisell, and for his Amended Answer to the Complaint heretofore filed, and shows unto this Honorable Court as follows:

1. Answering the allegations contained in paragraph 1 of the Complaint, the same are admitted.

2. Answering the allegations contained in paragraph 2 of the Complaint, the defendant denies that he sought to purchase quantities of onions which were owned by the plaintiff and others; further answering said paragraph, the defendant admits that he attended several meetings at which the plaintiff and others were present held in the City of Chicago, Illinois in November and December of 1955; that such meetings were called at the instigation of the plaintiff, but defendant admits that at the request of the plaintiff he advised certain others of the time and place set for such meetings.

3. The defendant denies the allegations contained in paragraph 3 of the Complaint as therein set forth. He

admits that on or about December 17, 1955 he, acting for and on behalf of Kelly Farms, a co-partnership located at Jackson, Michigan, of which the defendant is a co-partner, agreed with the plaintiff and the plaintiff's associate, one Sam Siegel, as a part of an over-all program to purchase from the plaintiff and the same Sam Siegel fifty (50) cars of onions in Chicago cold storage at the price and upon the terms alleged by the plaintiff in paragraph 3, of the Complaint;

Further answering said paragraph 3 of the Complaint, this defendant says that his commitment to accept 50 cars of onions was but one facet of an agreement entered into between the plaintiff and the aforesaid Sam Siegel on the one hand and the defendant and other persons who [fol. 12] dealt in or grew onions on the other hand, whereby the latter agreed to purchase a total of 287 carloads of onions in consideration of the promise then and there made by the plaintiff and his associate, Sam Siegel, who then represented themselves to be the owners of additional large supplies of onions both in cold storage in Chicago and elsewhere stored in the country not to deliver any of the onions so owned, held or controlled by them upon the futures market for the balance of the '55-'56 trading season.

Defendant further avers that all of the parties then and there further agreed that, for the purpose of creating a false and fictitious market condition, none of the parties entering into the agreement would deliver any of the onions then owned and held by the plaintiff and his associate, Sam Siegel which, under the terms of the agreement, were to be sold to the defendant or the others entering into said agreement or to be retained by the plaintiff and his associate, Sam Siegel, upon the futures market for the balance of the trading season.

4. Answering the allegations contained in paragraph 4 of the Complaint, the same are admitted;

Further answering, the defendant avers that he has refused to pay the balance of the purchase price for the reasons more fully set forth hereinafter in that section of the Amended Answer denominated as "Affirmative De-

fenses" and in that portion of the Amended Answer denominated as "Counter Claim", that said agreement between the plaintiff and the defendant is null and void as being contrary to public policy and as being violative of the Anti-Trust provisions of the laws of the State of Illinois, a true copy of which is annexed hereto as defendant's Exhibit I and made a part hereof as though set out in full, as being violative of the Anti-Trust provisions of the laws of the United States, specifically of Section 1 of Title 18 of the United States Code, and as being violative of Section 13 of Title 7 of the United States Code, and for the further reason that if said agreement is [fol. 13] legal, the plaintiff breached the agreement by delivering large quantities of onions on the futures market during the balance of the 1955-1956 trading season.

5. Answering the allegations contained in paragraph 5 of the Complaint, the defendant neither admits nor denies that storage charges in the amount of $5082.00 have been incurred by the plaintiff for lack of knowledge in the premises and, accordingly, the plaintiff is left to his strict proofs;

Further answering, the defendant admits that he has refused and does refuse to pay the storage charges although plaintiff has made demand therefor, for the reasons set forth hereinafter under the heading of "Affirmative Defenses" and "Counter Claim".

6. Answering the allegations set forth in paragraph 6 of the Complaint, the defendant admits that he withdrew thirteen (13) of the 50 carloads of onions ordered by him, but he specifically denies that he is required to pay any additional sums of monies to the plaintiff for the reasons hereinafter more fully set forth in the "Affirmative Defenses" and "Counter Claim".

7. Answering the allegations contained in paragraph 7 of the Complaint, the defendant admits that the onions purchased by the defendant are perishable agricultural commodities which may be stored for a reasonable period of time only;

Further answering, the defendant admits that a demand was made upon him by the plaintiff on February 16, 1956 to withdraw said onions from storage and to make full payment therefor, but the defendant denies that he acknowledged his obligation under the agreement, the truth of the matter being that the defendant was not obligated to withdraw any amounts of onions in February or any other time, but rather, was only obligated, when he did withdraw the onions from storage, to pay the balance due and owing on said onions, if it be assumed that said agreement was lawful.

[fol. 14] 8. Answering the allegations contained in paragraph 8 of the Complaint, the defendant admits that on or about March 9, 1956 he notified the plaintiff that he would withdraw no further onions from storage and that he would pay to plaintiff no further sums of monies for the reasons that said agreement, being a restraint upon trade and an effort to fix prices, was null and void

Further answering, the defendant neither admits nor denies that the plaintiff used his best efforts to mitigate damages and the defendant neither admits nor denies that the plaintiff realized the sum of $3,304.00 from the sale of such onions and the defendant neither admits nor denies that the sum of $3,204.00 was the fair market value of said onions for the reason that the defendant has no knowledge in the premises and thus leaves the plaintiff to his strict proofs.

9. Answering the allegations contained in paragraph 9 of the Complaint, the defendant denies, for the reasons hereinafter more fully set forth under the headings of "Affirmative Defenses" and "Counter Claim", that he owes any sums of money, whatsoever, to the plaintiff.

Affirmative Defenses

The defendant hereby gives notice to the plaintiff that upon a hearing of said cause the defendant will adduce evidence in support of the following affirmative defenses:

1. That the plaintiff, Vincent W. Kosuga and one Sam Siegel during the months of November and December of

1955 had in their possession or control approximately 600 carloads of onions in cold storage in the area of Chicago, Illinois, and that in addition thereto the plaintiff and said Sam Siegel had approximately 400 carloads of onions in storage in the country and that the said plaintiff and Sam Siegel on various occasions commencing in the latter part of November, 1955 and continuing to and until on or about the 17th day of December, 1955, represented to this defendant and diverse other growers of onions that unless [fol. 15] this defendant and other persons purchased a large portion of the onions owned by the plaintiff, the plaintiff and Sam Siegel would deliver large quantities of onions on the futures exchange for the avowed purpose of depressing both the futures and cash market price of onions. That this defendant and certain other growers of onions in attendance at the various meetings held at the initiative of the plaintiff and his associate Sam Siegel were the owners of large quantities of onions in the country, which they customarily sold through normal trade channels. That this defendant as well as the other onion growers feared that the delivery on the futures exchange of a large quantity of storage onions would seriously depress both the futures and the cash onion market to their irreparable loss and damage.

2. That the plaintiff and Sam Siegel did call three meetings during the months of November and December, 1955 for the express purpose of determining whether this defendant, Jack H. Kelly, Veril Baldwin, Lacerne Dickson, Lyle Jordan, William Gehring, Mike Minardo, either in their individual or representative capacities as officers or agents for individuals, firms or corporations, would agree to take and merchandise a portion of 600 carloads of onions then either owned or controlled by the plaintiff and Sam Siegel in cold storage in Chicago.

3. That at the second of these meetings, which was held on December 11, 1955, in Chicago, Illinois, the plaintiff and Sam Siegel agreed with this defendant and with the others present at the meeting that if they would purchase a portion of said 600 carloads of onions, the plaintiff and Sam Siegel would not deliver any onions on the futures market for the balance of the '55-'56 trading season.

4. That at said meeting and at a subsequent meeting held on December 17, 1955 this defendant and other persons either in their individual or representative capacities, agreed to purchase from the plaintiff and Sam Siegel two hundred eighty-seven (287) carloads of onions on terms similar to those set forth in Exhibit "A" which is attached to the Complaint.

[fol. 16] 5. That the avowed and express object of the agreement was to manipulate the market price of onions and to stabalize (sic) said price and, if possible, increase said price.

6. That the above mentioned contract, combination and conspiracy, since it had as its object the purpose of fixing prices and limiting the amount of onions to be sold in the State of Illinois, was null and void and unenforceable under the Anti-Trust laws of the State of Illinois, specifically Sections 15.62, 15.66 and 15.67 of the Jones Illinois Statutes Annotated, a true copy of which Sections is annexed hereto as defendant's Exhibit I and made a part hereof as though set out in full.

7. That the aforesaid contract, combination and conspiracy was in restraint of trade or commerce among the several states and thus is null and void under the provisions of the Sherman Anti-Trust Act, Sec. 1 of Title 15 of the United States Code inasmuch as said onions which were the subject of said agreement and contract were a part of interstate commerce.

8. That the said agreement, combination and conspiracy to fix prices and to manipulate the market price of onions in interstate commerce, as defined by Section 3 of Title 7 of the United States Code was in violation of Section 13 of Title 7 of the United States Code.

9. That inasmuch as the agreement upon which the plaintiff bases his cause of action is null and void and unenforceable, this Court cannot extend its aid to any parties thereto who are in pari delicto, but rather, must leave the parties in the present status quo.

Counter Claim

1. The defendant is and for a long time heretofore has been a commercial grower of onions in the States of Michigan and Wisconsin and that during the year of 1955 his various farms did produce great amounts of onions.

2. That on or about December 11th and/or December 17, 1955 the plaintiff for a good and valuable consideration, [fol. 17] namely the promise of the defendant to purchase fifty (50) carloads of onions from the plaintiff, did promise to and agree with the defendant that he, the plaintiff would not deliver on the futures market any onions whatsoever during the balance of the '55-'56 trading season.

3. That notwithstanding the defendant had fulfilled all of his obligations under said agreement, the plaintiff did breach his contract and agreement by selling large numbers of futures contracts of onions on the Chicago Mercantile Exchange during the ensuing trading months of the '55-'56 onion futures season.

4. That the plaintiff further breached and violated the agreement of December 11 and December 17, 1955 in that he and the said Sam Siegel had agreed with the defendant and the other growers and shippers of onions there present that they, the plaintiff and said Sam Siegel would not disrupt the onion cash market by delivery of unusual quanties (sic) of onions on the cash market or by selling onions in the country below the then prevailing price but that the plaintiff and the said Sam Siegel did throughout the balance of the '55-'56 trading season delivered (sic) large quantities of onions on the cash market and also sold the same in the country below the established purchasing price.

5. That the effect and direct result of the plaintiff's breach of contract, as above set forth, was a glutting of the cash market so that the price of onions on the market declined.

6. That the plaintiff was a heavy trader in futures on the Chicago Mercantile Exchange in the months of November and December of 1955 and that at the time he entered into the agreement with the defendant and others

as above set forth, he represented to the defendant and others there present that he would support the long side of the market. That notwithstanding such representations and the reliance thereupon by the defendant the plaintiff went short the futures market and caused a serious decline in both the futures and the cash market for onions.

[fol. 18] 7. That the defendant as the owner of a large supply of onions in the country, suffered damages in consequence of the forced and fictitious decline of the onion market, resulting from the plaintiff's conduct as aforesaid in the amount of Seventy-five Thousand ($75,000.00) Dollars.

Wherefore, defendant prays entry of a judgment in the sum of Seventy-five Thousand ($75,000.00) Dollars plus costs and attorney fees.

/s/ Joseph W. Louisell, Attorney for Defendant,
2366 Penobscot Building, Detroit 26, Michigan.

Dated: Detroit, Michigan, March 7, 1957.

Exhibit I

JONES ILLINOIS STATUTES ANNOTATED

15.62. TRUSTS, POOLS AND COMBINES DEFINED. CONSPIRACY] Section 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly: If any corporation organized under the laws of this or any other State or country for transacting or conducting any kind of business in this State or any partnership or individual or other association of persons whatsoever, shall create, enter into, become a member of or party to any pool, transaction, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article or merchandise or commodity or shall enter into, become a member of or a party to any plan, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity

or merchandise to be manufactured, mined, produced or sold in this State, such corporation, partnership or in-
[fol. 19] dividual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this Act.

15.66 DECLARES CONTRACTS AND AGREEMENTS IN VIOLATION OF THIS ACT VOID] §5. Any contracts or agreements in violation of any provisions of the preceding Sections of this Act shall be absolutely void.

15.67 EXEMPTS PURCHASERS OF COMMODITIES, PRODUCED OR MANUFACTURED IN VIOLATION OF THIS ACT, FROM PAYMENT.] Any purchasers of any article or commodity from any individual, company or corporation transacting business contrary to any provisions of the preceding sections of this Act shall not be liable for the price or payment of such article or commodities, and may plead this Act as a defense to any suit for such price or payment.

IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE DEFENSE AND REPLY TO AMENDED ANSWER—Filed November 30, 1956

FIRST

Plaintiff moves the court for an order striking from the defendant's amended answer the following paragraphs set forth therein as defenses to the action brought, on the ground that said defenses fail to state a legal defense to the claim set forth in plaintiff's complaint:

1. The entire "Affirmative Defenses".

2. From the amended answer.

A. The allegation in paragragh 3 that the parties further agreed for the purpose of creating a false and fictitious market condition, that none of the parties would deliver onions purchased or held on the futures market for the balance of the trading season.

[fol. 20] B. The allegation in paragraph 4 that the agreement between the plaintiff and defendant is null and void as being contrary to public policy, violation of the antitrust provisions of the laws of the State of Illinois and the laws of the United States, and violative of Section 13 of Title 7 of the United States Code.

SECOND

Plaintiff in reply to the amended answer and as answer to the affirmative defenses and counterclaim filed by the defendant herein, states as follows:

1. Denies the allegations in paragraph 3 of said amended answer that Sam Siegel was an "associate" of the plaintiff or was in any legal way connected, associated or acted in concert with plaintiff in connection with the transactions here involved.

Denies that plaintiff agreed by himself or in conjunction with any other person not to deliver onions on the futures market for the balance of the trading season for the purpose of creating a false and fictitious market condition.

Replying further, plaintiff avers that the defendant was a substantial speculator on the long side of the market in onion futures and actual onions during November and December, 1955; that defendant sought to purchase from the plaintiff a portion of plaintiff's actual onions held in Chicago; that plaintiff was willing to and did actually sell to the defendant fifty carloads of onions as alleged, but that defendant imposed as a condition of said purchase a requirement that the plaintiff would not deliver his remaining holdings of onions on the futures market for the balance of the futures trading season but instead would merchandise such onions in normal channels of trade.

2. Denies the legal conclusions contained in paragraph 4 of the amended answer that the purchase and sale of the onions here involved is null and void as contrary to public policy, in violation of the antitrust provisions of the laws of Illinois and the laws of the United States, and in [fol. 21] violation of Section 13 of Title 7 of the United States Code. Plaintiff further denies that he breached any agreement with the defendant.

3. Replying to the allegations in paragraph 8 of the amended answer, plaintiff states that the defendant did on or about March 9, 1956, notify plaintiff that he would not pay plaintiff the balance due on his contract to purchase fifty carloads of onions; that the market price of onions had progressively declined since the purchase made on December 17, 1955, and that defendant repudiated his contract solely and entirely because of such decline in the market price of the onions purchased.

IN ANSWER TO THE AFFIRMATIVE DEFENSES

4. Plaintiff denies any association with or action in combination or in concert with Sam Siegel with respect to any of the transactions here involved as alleged or implied in paragraphs 1, 2, 3 and 4 of the affirmative defenses.

5. Denies the allegations in paragraph 1 of the affirmative defense that plaintiff on various occasions or at any time represented to the defendant and divers other growers of onions that unless defendant and others purchased a large portion of the onions owned by plaintiff, he would deliver large quantities of onions on the futures exchange for the avowed purpose of depressing both the futures and cash market price of onions; denies that the various meetings referred to were held at the initiative of the plaintiff; answering further, plaintiff is without knowledge of the truth or falsity of the allegations with respect to Sam Siegel or the feelings and fears of other onion growers not parties to this litgation (sic) and, therefore, demands strict proof thereof.

6. Denies the allegation in paragraph 2 of the affirmative defenses that plaintiff called three meetings or any meeting during the months of November and December, 1955, for the purposes therein indicated.

[fol. 22] 7. Denies the allegation in paragraph 3 of the affirmative defenses and states in answer thereto that defendant was a substantial speculator on the long side of the market in onion futures and actual onions during November and December, 1955; that defendant sought to pur-

chase from the plaintiff a portion of plaintiff's actual onions held in Chicago; that plaintiff was willing to and did actually sell to the defendant fifty carloads of onions as alleged, but that the defendant imposed as a condition of said purchase a requirement that the plaintiff would not deliver his remaining holdings of onions on the futures market for the balance of the futures trading season but instead would merchandise such onions in normal channels of trade.

8. Denies the allegations in paragraphs 5, 6, 7, 8 and 9 of the affirmative defenses.

In Answer to the Counterclaim Herein Filed

9. Plaintiff denies the allegations of paragraph 2 of the counterclaim that in consideration of the purchase by defendant of fifty carloads of onions that plaintiff promised and agreed that he would not deliver on the futures market any onions whatsoever during the balance of the 1955-56 trading season.

10. Denies the allegations in paragraph 3 of the counterclaim that defendant had fulfilled all of his obligations under the agreement with the plaintiff and denies that plaintiff breached any contract or agreement with defendant in the manner indicated or in any manner.

11. Denies the allegations in paragraphs 4, 5, 6 and 7 of the counterclaim.

Wherefore, plaintiff, Vincent W. Kosuga prays that the defenses specified be stricken from the defendant's pleadings for failing to state a legal defense to the claim set forth in plaintiff's complaint and that judgment be entered [fol. 23] in favor of plaintiff, Vincent W. Kosuga, and against the defendant, Jack H. Kelly, as prayed.

/s/ Lee A. Freeman, /s/ A. Bradley Eben, Attorneys for Plaintiff.

Lee A. Freeman, 105 S. LaSalle Street, Chicago, Illinois.

A. Bradley Eben, 11 S. LaSalle Street, Chicago, Illinois.

March 22, 1957.

In United States District Court

Memorandum Opinion on Motion to Strike Affirmative Defenses—April 24, 1957

Complaint was filed September 11, 1956 under Section 1332, Title 28 of the United States Code to recover the balance of $37,342.80 due on a contract for the sale of 50 carloads of onions. Defendant answered, setting up as Affirmative Defenses, alleged violation of the Illinois Antitrust Law, (Jones. Ill. Stats. Ann. Secs. 15.62, 15.66 and 15.67), the Federal Antitrust Act, (15 U. S. C. Sec. 1) and the Commodity Exchange Act (7 U. S. C. Sec. 13), on the ground that in consideration for the purchase of these 50 cars of onions, plaintiff had agreed not to deliver the remainder of his onions on the futures market. This condition it is asserted had as its object the manipulation, stabilization and if possible increase in onion market prices.

Defendant further alleges that if the agreement is legal, then plaintiff was guilty of a breach by delivering onions on the futures market, by selling futures contracts and selling actual onions below established prices. Defendant, for these alleged breaches, counterclaims for $75,000.00.

[fol. 24] Plaintiff filed a motion to strike the Affirmative Defenses based upon alleged violations of the antitrust laws and the Commodity Exchange Act, and a reply denying the alleged breaches asserted in the counterclaim.

Presented for our decision is the motion to strike the defendant's Affirmative Defenses. The facts as admitted by the pleadings are:

Plaintiff owned actual onions in Chicago and in the country. On December 17, 1955 defendant, as one of several individuals, purchased 50 carloads of such onions for $960.00 per car or a total of $48,000.00, plus storage charges. The purchase agreement provided for an initial payment of $300.00 per car, a second payment of $200.00 per car due January 10, 1956 and the balance of 460.00 per car plus storage due when defendant ordered the cars out of storage. As a condition to this purchase, plaintiff agreed not to deliver any of his remaining onions on the futures market for the remainder of the season, but instead to merchandise such onions in normal commercial trade channels.

Defendant paid $12,500.00 on account of his purchase, and from time to time withdrew from storage and utilized 13 carloads of onions, but failed to make payment therefor as required. Significantly, subsequent to the purchases, the market price of onions progressively declined.

Onions are a perishable commodity which can be stored only for a reasonable period. On February 16, 1956, plaintiff advised that the onions purchased were showing deterioration, and requested defendant to take the onions and make full payment thereon. Defendant refused to accept the onions at that time, but acknowledged the validity and enforceability of his purchase agreement.

On March 9, 1956 defendant repudiated the agreement claiming it was illegal in violation of antitrust laws and the Commodity Exchange Act. Plaintiff, after notice, sold the 37 cars of onions remaining from defendant's purchase, and credited defendant with the amount realized in mitigation of damages.

This is an action to enforce payment for onions sold to and received by defendant, at a price that is not objected to as unreasonable or excessive. The contract of purchase [fol. 25] was complete in itself and contains reciprocal considerations moving between the parties. The condition of non-delivery which is asserted as a violation of the antitrust laws and the Commodity Exchange Act is not an inherent part of the sale which is here sought to be enforced. Plaintiff does not seek to enforce that provision. A judgment, if rendered for the plaintiff, would not afford judicial aid to the enforcement of an allegedly illegal condition. In the present posture, our decision on the motion to strike is governed by the principles announced in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 551; *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 172-3; *Small Co.* v. *Lamborn Co.*, 267 U. S. 238; and *Bruces' Juices, Inc.* v. *American Can Co.*, 330 U. S. 743.

In the *Wilder* case the Supreme Court upheld the rejection of a defense of alleged violation of the antitrust laws when asserted in an action to recover the price of goods sold. There the purchase agreement contained conditions allegedly restrictive of competition. The court expressed the rule controlling in this proceeding on pages 172 and 173 as follows:

"* * * the sale and the obligations which arose from it depended upon a distinct contract, with reciprocal considerations moving between the parties,—the receipt of the goods on the one hand, and the payment of the price on the other. And this is but a form of stating the elementary proposition that courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so, or some remote aid to the accomplishment of a wrong which might possibly result * * * "

"The case therefore reduces itself to the question whether the contract of sale was inherently illegal so as to bring it within the also elementary rule that courts will not exert their powers to enforce illegal contracts or to compel wrongdoing. The only suggestion as to the intrinsic illegality of the sale results from the averments of the answer as to the offer of a percent- [fol. 26] age of profits upon the condition of dealing exclusively with the refining company for the following year, and the clause to the effect that the goods were bought by the manufacturing company for its own use, and not for resale. But we can see no ground whatever for holding that the contract of sale was illegal because of these conditions."

We are further impelled to our conclusion by the fact that the federal laws invoked provide various sanctions in the event of violation, but do not make uncollectibility of the purchase price for goods sold one of those sanctions. The remedies provided by the Federal Antitrust Acts or the Commodity Exchange Act are exclusive, and do not afford defendant the affirmative defense here asserted: *D. R. Wilder Mfg. Co.* v. *Corn Products Ref. Co., supra, Bruce's Juices, Inc.* v. *American Can Co., supra.*

Furthermore, the non-delivery condition if regarded as illegal, would not insulate defendant from the obligation of paying the agreed price for goods purchased and received. The illegal condition or covenant in such circumstances would be separated from the lawful promise for a lawful consideration and the latter agreement enforced: *Cincin-*

nati etc. Packet Co. v. *Bay,* 200 U. S. 179; *U. S. Hoffman Machinery Corp.* v. *Valeteria Cleaners, Inc.,* 143 F. Supp. 797 (D. C. Minn.).

What we have said concerning the defense based on alleged violation of the Federal Antitrust Acts serves also to dispose of the defense of alleged violations of the Illinois Antitrust Law—if that state act could be said to be applicable. Defendant asserts that the transactions involved are in interstate commerce and therefore the question naturally arises whether the state antitrust law is even applicable.

Plaintiff also seeks to strike the Affirmative Defenses as insufficient in law by asserting that the non-delivery condition is not an unlawful restraint of trade or manipulative device. Plaintiff agreed, as a condition to this sale of onions, to merchandise the remainder of his onions in nor- [fol. 27] mal trade channels and not to deliver them on the futures market during the remainder of the current onion season. Deliveries on futures market may have temporary price upsetting consequences which may interfere with defendant's efficient and profitable disposition of the onions he had purchased. The condition imposed by defendant and agreed to by plaintiff was a reasonable restriction to assure defendant the enjoyment of the legitimate fruits of his contract of purchase, and to protect him from a possible derogation in the value of the property bought. This condition does not constitute an illegal restraint of trade proscribed in the Federal or Illinois antitrust laws: *U. S.* v. *Addyston Pipe & Steel Co.,* 85 Fed. 271 (C. A. 6); *Cincinnati etc. Packet Co.* v. *Bay, supra; D. R. Wilder Mfg. Co.* v. *Corn Products Ref. Co., supra.*

Nor is the non-delivery condition violative of the provisions in the Commodity Exchange Act against manipulation of markets and commodity prices. Manipulation as contemplated under that act may be defined as the creation of an artificial price by planned and deliberate action. The devices commonly employed to achieve manipulation are deceit, trickery through the spread of false market and economic rumors, concealment of market position, the violation of express anti-manipulative controls set forth in the Commodity Exchange Act, or other forms of fraud: *General Foods Corp* v. *Brannan,* 170 F. (2d) 220, 224, 231.

Defendant does not allege that the non-delivery condition was intended to achieve an artificial price or that plaintiff utilized or agreed to any manipulative device in the sale or merchandising of his onions. The Affirmative Defenses do not allege a manipulation as contemplated by and in violation of the Commodity Exchange Act.

Fifty carloads of onions were sold on December 17, 1955 on terms and conditions admitted by the pleadings. Defendant, however, seeks to avoid payment by the drastic step of asserting that he was a participant with the plaintiff in a market rigging operation. He is placed in a peculiar position by also asserting that plaintiff did not comply with the illegal conditions involved.

[fol. 28] It is obvious that this position was in no small part conceived after declines in market prices, made the purchases of onions unattractive and unprofitable. We will not lend our aid to the creation of windfall profits as thus contemplated.

We find the agreement of purchase and sale of fifty carloads of onions to be valid and binding, and the Affirmative Defenses asserted to be insufficient in law. The plaintiff's motion to strike is granted. An appropriate order will be entered.

.....

U. S. District Judge.

April 24, 1957.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING MOTION TO STRIKE AFFIRMATIVE DEFENSES—Filed July 11, 1957

You are hereby notified that Judge Igoe entered the following order on 4-24-57:

Plaintiff's motion to strike affirmative defenses is granted and said affirmative defenses are hereby stricken. Cause set for trial on June 17, 1957.

Roy H. Johnson, Clerk.

[fol. 29]

IN UNITED STATES DISTRICT COURT

MOTION FOR RECONSIDERATION OF ORDER GRANTING THE PLAINTIFF'S MOTION TO STRIKE "AFFIRMATIVE DEFENSES" CONTAINED IN DEFENDANT'S AMENDED ANSWER—
Filed July 11, 1957

Now comes the defendant, Jack H. Kelly, by one of his attorneys, Joseph W. Louisell, and moves this court to reconsider the order granting plaintiff's motion to strike the "Affirmative Defenses" contained in defendant's amended answer. The following grounds are relied upon in support of the instant motion.

1. That the court erred in determining that the condition of non-delivery was not an inherent part of the sale and that, accordingly, the defendant could not assert a violation of the Sherman Anti Trust Act and of the Commodity Exchange Act as a defense, the fact of the matter being, as indicated by the pleadings, that the contract of sale was made in pursuance of and in furtherance of a "price fixing" agreement, which was illegal per se and which cannot be enforced.

2. That the court erred in determining, notwithstanding the plain language of Sections 15.62, 15.66 and 15.67 of Jones Illinois Statutes Annotated, that the defendant could not plead the Illinois Anti Trust Act as a defense to any suit for the price or payment of any article or commodity secured from any individual transacting business in violation of the Illinois Anti Trust Act, even if it would be assumed *arguendo,* that a portion of the consideration for the purchase of the onions in question was legal. (Evans v. American Strawboard Company, 114 Ill. App. 415 (1904).)

3. That the court erred when it determined that the defenses of a violation of the Sherman Anti Trust Act and of the Commodity Exchange Act could not be asserted in [fol. 30] litigation in which the seller of a commodity is seeking the purchase price, the law being that the violation of said statutes may be asserted as a valid defense

where a suit is based upon an agreement which has as its object and effect the accomplishment of illegal ends which would be consummated by the judgment sought.

4. That the court erred when it determined that the non-delivery condition was not an unlawful restraint of trade or a manipulative device, it being axiomatic that a "price fixing" agreement is illegal per se, whether reasonable or not.

5. That the court erred when it determined that the defendant did not allege a valid defense in relying upon a violation of the Commodity Exchange Act for the reason that there was no allegation of a fraudulent practice upon the part of the plaintiff, the fact of the matter being that paragraph 5 of the "Affirmative Defenses" alleges a manipulation of the market price of onions and the Commodity Exchange Act explicitly holds such conduct to be illegal.

6. That this motion is filed at the present time because neither Mr. Joseph W. Louisell, nor Mr. Richard E. Gorman, counsel for the defendant, have ever received notice of the entry of an order on April 24, 1957, granting the plaintiff's motion to strike;

That Mr. Joseph W. Louisell was absent from his office from April 24, 1957 to June 12, 1957, but prior to his departure he instructed his associate, Ivan E. Barris, to handle the instant cause in his absence and, specifically, to be alerted to any communication from this court pertaining to the disposition of the plaintiff's motion to strike;

That on May 13, 1957, Ivan E. Barris, received a telephone call from a business associate of the defendant, one Mr. Black, who informed Ivan E. Barris that he had heard that this court had disposed of the motion to strike. That immediately upon receipt of said call, Ivan E. Barris, dispatched a letter over the signature of Joseph W. [fol. 31] Louisell to the Clerk of this Court, a true copy of which is annexed hereto and made a part hereof, as though set out herein in full;

That when no response whatsoever to the aforesaid letter was received from this court, Ivan E. Barris did place a long distance telephone call to the Clerk of this Court and did speak to a person who represented himself to be the Clerk of this Court;

That when Ivan E. Barris made inquiry as to the disposition of the aforesaid motion to strike, said person did positively and unequivocally represent to Ivan E. Barris that the motion had not been disposed of, that rumors to the contrary were false, and that the court was still taking under advisement the said motion to strike.

That on or about June 21, 1957, Joseph W. Louisell did receive notice that the instant cause had been re-set for trial on September 24, 1957, whereupon Joseph W. Louisell did call counsel for the plaintiff, Lee A. Freeman, who did state that the cause had been originally set for hearing on June 17, 1957; that he requested the court to adjourn the matter until September 24, 1957, and that he had received notice of the order granting motion to strike only a few days prior thereto;

That neither counsel for the defendant herein had ever received notice that the trial of the instant cause would be heard on June 17, 1957.

This motion is based upon the files and records of the instant cause and upon the affidavit of Joseph W. Louisell, the affidavit of Ivan E. Barris, and the affidavit of Richard E. Gorman.

Wherefore, defendant prays this honorable court to reconsider its order granting plaintiff's motion to strike certain affirmative defenses contained in defendant's [fol. 32] amended answer and that an order be entered denying said motion to strike.

/s/ Joseph W. Louisell, Attorney for Defendant,
2366 Penobscot Building, Detroit 26, Michigan.

Dated: June 28, 1957.

ATTACHMENT TO MOTION

Notice of Hearing

To: Lee A. Freeman, Attorney for Plaintiff, 105 So. LaSalle Street, Chicago 3, Illinois.

Please take notice that the annexed Motion for Reconsideration of Order Granting the Plaintiff's Motion to Strike "Affirmative Defenses" contained in Defendant's Amended Answer, copy of which was heretofore served upon you, will be brought on for hearing before the Honorable Michael L. Igoe, at his court room at the Federal Building, in Chicago, Illinois, on Friday the 12th day of July, 1957, at 2:00 o'clock in the afternoon or as soon thereafter as counsel may be heard.

/s/ Joseph W. Louisell, Attorney for Defendant, 2366 Penobscot Building, Detroit 26, Michigan.

[fol. 33] ATTACHMENTS TO MOTION

Affidavit

State of Michigan,
County of Wayne—ss.

Joseph W. Louisell, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff herein; that he has prepared the annexed Motion for Reconsideration of Order Granting the Plaintiff's Motion to Strike "Affirmative Defenses" contained in Defendant's Amended Answer; that the matters stated therein are true to the best of his knowledge except as to those matters therein stated to be upon information and belief, and as to it he believes it to be true.

/s/ Joseph W. Louisell.

Subscribed and sworn to before me this 28th day of June, 1957.

Eileen M. Mahoney, Notary Public, Wayne County, Michigan. My commission expires: February 14, 1959.

State of Michigan,
County of Wayne—ss.

Ivan E. Barris, being first duly sworn, deposes and says that he is an associate of Joseph W. Louisell; that when said Joseph W. Louisell departed for a period of 7 weeks from his office, commencing on April 24, 1957, he instructed the deponent to handle the matter of Kosuga v. Kelly and to, especially, keep alerted to the arrival of an order disposing of the plaintiff's motion to strike.

Deponent further sayeth that notice of the entry of an order disposing of said motion to strike was never received in the office of Porritt, Freud, Toppin & Louisell; that on May 13, 1957 your deponent received a telephone [fol. 34] call from one Mr. Black, a business associate of the defendant, during the course of which Mr. Black stated that he had heard rumors to the effect that said motion to strike had been decided adversely to the defendant; that thereupon your deponent wrote a letter to the Clerk of the United States District Court, a true copy of which is annexed hereto to the motion for reconsideration, and that no reply to such letter was ever received; that on or about May 20, 1957, your deponent put in a long distance call to Judge Igoe's Clerk and that a person representing himself to be said Clerk affirmatively represented to your deponent that the motion to strike had not been decided, that rumors to the contrary were false, and that the matter was still being held under advisement by the Court; that when Joseph W. Louisell returned to his office on June 12, 1957, and inquired as to the disposition of the motion to strike, your deponent did inform him as to what had transpired.

Further your deponent sayeth not.

/s/ Ivan E. Barris.

Subscribed and sworn to before me this 28th day of June, 1957.

Eileen M. Mahoney, Notary Public, Wayne County, Michigan. My Commission expires: February 14, 1959.

[fol. 35] Affidavit

State of Illinois,
County of Cook—ss.

Richard E. Gorman, being first duly sworn, deposes and says that he is one of the attorneys for the defendant herein; that he has never received from the United States District Court any notice pertaining to the disposition of the plaintiff's motion to strike the "Affirmative Defenses" in the defendant's amended answer and that he first received information concerning the disposition of said motion when he received a telephone call on or about June 21, 1957, from Joseph W. Louisell, who made inquiry of your deponent as to whether your deponent had received any notice of the entry of an order granting the motion to strike.

/s/ Richard E. Gorman.

Subscribed and sworn to before me this 28th day of June, 1957.

Doris M. Ronicke, Notary Public, Cook County, Illinois. My Commission expires: June 6, 1959.

[fol. 36] Exhibit to Motion

May 13, 1957

Clerk to Judge Igoe,
U. S. District Court,
United States Court House,
Chicago 4, Illinois.

Re: Kosuga v. Jack H. Kelly
No. 56-C-1502

Dear Sir:

I have been informed unofficially that the plaintiff's motion to strike the affirmative defenses of the defendant and a portion of the defendant's answer has been granted, but I have received no official notice thereof.

If my information is correct, and if Judge Igoe has written an opinion, I would be most appreciative if you could send a copy of the opinion to me, so that I may

take appropriate and timely measures to appeal the judge's order.

Yours very truly,

/s/ Joseph W. Louisell.

JWL:EMM

[fol. 37]

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR RECONSIDERATION—
August 16, 1957

This cause coming on to be heard on the written motion of the plaintiff to strike certain defenses and pursuant to notice to all parties, and the court having heard the arguments of counsel and being advised in the premises,

It is hereby ordered:

1. That plaintiff's motion to strike the affirmative defenses alleged by the defendant is hereby granted.

2. That the allegations in paragraph 4 of the amended answer to the effect that the agreement of purchase of onions between the plaintiff and defendant is null and void as being contrary to public policy, violative of Section 13 of Title 7 of the United States Code are hereby stricken.

3. That the section of the amended answer entitled "Affirmative Defenses" is hereby stricken.

4. That the defendant's motion for reconsideration of the court's decision to grant the plaintiff's motion to strike certain affirmative defenses is hereby denied.

5. That the cause is set for trial on September 24, 1957.

Enter:

/s/ Igoe, Judge.

Dated: August 16, 1957.

[fol. 38]

IN UNITED STATES DISTRICT COURT

MOTION FOR SUMMARY JUDGMENT—Filed August 22, 1957

Plaintiff, Vincent W. Kosuga, by his attorneys Lee A. Freeman and A. Bradley Eben, moves the court for the entry pursuant to Rule 56 of the Federal Rules of Civil Procedure of a summary judgment in plaintiff's favor in the amount of $37,342.80, the relief demanded in the complaint, and a summary judgment dismissing the counterclaim filed herein by the defendant on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law and is entitled to dismissal of the defendant's counterclaim as a matter of law.

This motion is based upon:

(a) The complaint and amended answer filed in this cause; and

(b) The supporting affidavit of Don R. Black which is attached hereto.

Lee A. Freeman, A. Bradley Eben, Attorneys for Vincent W. Kosuga, Plaintiff.

Dated August 22, 1957.

Lee A. Freeman, 105 S. LaSalle Street, Chicago, Illinois. An. 3-6939.

[fol. 39] ATTACHMENT TO MOTION

Affidavit

State of Illinois,
County of Cook—ss.

Don R. Black, being first duly sworn on oath deposes and says that he is a resident of Winnetka, Illinois; that he and Jack Kelly are officers in the firm of Kelly-Black Company, a registered futures commission merchant and a clearing member of the Chicago Mercantile Exchange. Prior to 1955 and continuing to the spring of 1956, Vincent W. Kosuga

was a customer of the firm of Kelly-Black Company. During the period from December 17, 1955 to April 1956, affiant in his individual capacity and distinct from the Kelly-Black Company, maintained books and accounts for Vincent W. Kosuga of his sales of cash onions to various individuals, including the sale of 50 carloads of onions to Jack Kelly on or about December 17, 1955. The bills for storage and inspection charges paid after December 17, 1955 by Vincent W. Kosuga on account of such carlots of onions sold, were maintained by affiant. The following 50 carlots of onions sold to Jack Kelly incurred the indicated storage charges during the period from December 17, 1955 to March 12, 1956, which charges were paid by Vincent W. Kosuga:

[fol. 40]

Carlot Number	Storage Charge Incurred	Carlot Number	Storage Charge Incurred
S 1317	$126	73302	$126
S 1329	42	H 9792	84
S 1334	42	48577	84
73005	126	H 9890	84
73010	42	48619	126
73010	42	48619	126
48287	126	38638	126
48281	84	48432	126
48253	84	48466	126
48252	84	73311	84
48276	84	48521	42
S 1364	126	48550	42
73085	126	48552	126
48321	126	48586	84
73157	126	48585	84
48341	126	48615	126
48346	126	48643	126
73192	84	H 9837	84
48374	84	H 9819	126
48353	84	48441	84
48367	84	H 9796	84
48440	126	H 9910	126
48427	126	73273	126
48461	126	48472	126
48489	126	H 9856	126
		Total storage charges paid	$5,082.

On or about February 7, 1956, the following 13 carlots of onions were withdrawn from storage by Jack Kelly and sold to Campbell Soup Company:

S 1329	48252	48550
S 1334	48253	H 9837
73010	48276	48441
73031	H 9890	
48281	48521	

[fol. 41] In March 1956, the prices for cash onions stored in Chicago dropped substantially and difficulties were encountered in the merchandising of such onions due to the arrival in Chicago of fresh Texas onions. On March 19, 1956, Vincent W. Kosuga asked affiant if he knew of any buyers desiring Chicago storage onions. Pursuant to such request, affiant notified Mr. Kosuga that Campbell Soup Company was interested in 14 carlots of such onions and thereupon the following carlots of onions were sold by Mr. Kosuga to Campbell Soup Company on March 19, 1956, for $180 per carlot, or a total of $2,515.20 (with allowances for shortages).

S 1317	48341	48466
48287	48346	48552
S 1364	73192	48615
73085	H 9792	H 9796
48321	48619	

An additional 8 carlots of such onions were sold by other onion brokers under instruction from Mr. Kosuga and the following prices realized as reported to affiant:

Carlot Number	Price per Carlot
73157	$ 55.00
48461	178.80
H 9882	90.00
48432	65.00
48643	120.00
H 9819	75.00
H 9910	45.00
H 9856	60.00
Total	$688.80

The remaining 15 carlots of onions had deteriorated in condition, could not be sold and were abandoned.

[fol. 42] The total realized by Vincent W. Kosuga in the liquidation of said 37 carlots was $3,204.00.

Further affiant sayeth not.

/s/ Don R. Black.

Subscribed and sworn to before me this 20 day of August, A. D. 1957.

/s/ Lilyan Fisher (Seal)
Notary Public.

IN UNITED STATES DISTRICT COURT

ANSWER TO MOTION FOR SUMMARY JUDGMENT—
Filed September 11, 1957

Now comes the defendant, Jack H. Kelly, by his attorney, Joseph W. Louisell, and for his answer to the motion for summary judgment heretofore filed, shows unto this honorable court as follows:

While counsel for the defendant respectfully, but vigorously, disagrees with the conclusion reached by this honorable court at pages 7 and 8 of its memorandum opinion of April 24, 1957 that the so-called "non-delivery" condition of the contract was not an unlawful restraint of trade or manipulative device but rather was a reasonable restriction to assure the defendant of the enjoyment of the legitimate fruits of his contract of purchase, assuming that this honorable court was correct in reaching such a conclusion of law, this defendant is entitled to a trial by jury of the factual issues raised by the allegations in the counterclaim of the defendant and denied in the reply filed by the plaintiff, said factual issues being:

1. Whether the plaintiff breached the so-called "Non-delivery" provisions of the contract by selling large numbers of futures contracts of onions on the Chicago Mercan-

tile Exchange during that portion of the 1955-1956 trading season subsequent to December 17, 1955 and whether the plaintiff did further breach the provisions of the so-called [fol. 43] "non-delivery" contract by delivering unusual quantities of onions on the cash market or by selling onions in the country below the prevailing price during that portion of the 1955-1956 trading season subsequent to December 17, 1955.

2. The extent of the damages suffered by the defendant as the result of the breach by the plaintiff of the provisions of the so-called "non-delivery" condition of the contract.

/s/ Joseph W. Louisell, Attorney for the Defendant,
2366 Penobscot Building, Detroit 26, Michigan.

Dated: September 10, 1957.

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

State of Michigan,
County of Wayne—ss.

Joseph W. Louisell being first duly sworn, deposes and says that he is one of the attorneys of record for the defendant, Jack H. Kelly, in the above entitled cause.

Affiant does further say that while it is his considered professional opinion that this honorable court erred in its memorandum opinion of April 24, 1957 when it concluded that the so-called "non-delivery" condition of the contract was not an unlawful restraint of trade but rather was a reasonable restriction to assure the defendant of the enjoyment of the legitimate fruits of his contract of purchase, assuming that this honorable court was correct in reaching such a conclusion of law, it is the considered professional opinion of the affiant that the plaintiff is not entitled to a summary judgment dismissing the defendant's counterclaim in which the defendant seeks damages against the plaintiff for an alleged breach of the so-called "non-delivery" condition of the contract for the reason that material [fol. 44] issues of fact exist as to whether the plaintiff did breach the provisions of the so-called "non-delivery" con-

dition of the contract and whether the defendant suffered any damages as the result of the alleged breach of the contract as aforesaid.

Affiant further states that in view of the provisions of Sub-section c of Rule 56 of Federal Rules of Civil Procedure, the plaintiff is not entitled to a summary judgment since there remains unresolved certain issues of fact which must be determined by the jury.

/s/ Joseph W. Louisell

Subscribed and sworn to before me this 10th day of September, 1957.

Eileen M. Mahoney, Notary Public, Wayne County, Michigan. My commission expires February 14, 1959.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF VINCENT W. KOSUGA—
Filed September 20, 1957

Vincent W. Kosuga, being duly sworn, deposes and says:

That he resides in Pine Island, Orange County, New York and is the plaintiff in the above entitled action.

1. That deponent did not, during the term of the contract, subsequent to December 17, 1955, speculatively sell any onion contracts on the Chicago Mercantile Exchange. That all sales made were hedges against actual cash onions then owned by the deponent, Vincent W. Kosuga.

2. That during said period, subsequent to December 17, 1955 and to the end of February, 1956, deponent, Vincent W. Kosuga, made no deliveries of onions on the Chicago Mercantile Exchange.

3. That during the period subsequent to December 17, 1955 and for the balance of the 1955 and 1956 season, all [fol. 45] onions sold by the deponent, Vincent W. Kosuga, in the country, were at all times sold at prevailing market

prices for cash onions at the time of the sale and not below such prevailing market prices.

/s/ Vincent W. Kosuga

Sworn to before me this 12th day of September, 1957.

Michael A. Gurda, Notary Public in the State of New York, Orange County No. 250. Commission expires: March 30, 1959.

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—
Filed September 26, 1957

This cause coming on to be heard upon the complaint of the plaintiff, the amended answer of defendant as modified by an order entered August 15, 1957 striking certain affirmative defenses, the counterclaim of defendant, the plaintiff's reply to the amended answer and answer to the counterclaim, the motion of plaintiff for a summary judgment with supporting affidavits and the answer to said motion filed by defendant, and the Court, having considered the facts admitted by the pleadings, the affidavits filed and the arguments of counsel, hereby enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Vincent W. Kosuga, plaintiff herein, is a citizen of the State of New York, and Jack H. Kelly, defendant herein, is a citizen of the State of Illinois. The amount in controversy, exclusive of interest and costs, exceeds $3,000.00.

[fol. 46] 2. On or about December 17, 1955, defendant purchased and plaintiff sold fifty (50) cars of U. S. No. 1 Grade Yellow Globe Onions in Chicago storage at $960.00 per car for a total of $48,000.00, plus storage charges incurred after such sale. The terms of said purchase and sale required an initial cash payment of $300.00 per car, or $15,000; a second payment by January 10, 1956 of $200.00 per car, or $10,000; and the balance of $460 per car, or

$23,000, plus storage charges incurred, to be paid when defendant ordered the cars of onions released from storage.

3. As a condition of said purchase and sale, plaintiff agreed that he would not deliver the remainder of his holdings of cash onions on futures market during the current onion season, but instead, would merchandise such onions in normal trade channels.

4. Defendant has only made the following payments to plaintiff:

On December 22, 1955	$7,500
On January 18, 1956	5,000

These payments do not fulfill the terms of payment required by the purchase and sale agreement. Defendant has not complied with the obligations imposed by said agreement.

5. Storage charges in the amount of $5,052 have been incurred by the plaintiff, which according to the agreement is an obliagtion (sic) of the defandant.

6. On or about February 7, 1956, thirteen (13) cars of said onions purchased were withdrawn from storage by defendant and sold.

7. The onions purchased by defendant are perishable agricultural commodities which may be stored only for a reasonable period of time. On February 16, 1956, plaintiff advised defendant that the onions purchased were showing deterioration and demanded that defendant withdraw said onions from storage and make full payment therefor.

[fol. 47] 8. On or about March 9, 1956, defendant repudiated his agreement of purchase. Plaintiff thereupon used his best efforts to mitigate the damages involved by selling and disposing of said onions for the account of defendant. There was realized from the liquidation of the remaining 37 cars of onions purchased by defendant the amount of $3,204.

9. The balance due plaintiff under said contract of purchase is $37,342, computed as follows:

Purchase Price		$48,000.00
Storage Charges		5,082.00
		$53,082.00
Less:		
Adjustment on account of shortage	$ 35.20	
Amount paid by defendant	12,500.00	
Amount realized by plaintiff in liquidation of onions for account of defendant	3,204.00	15,739.20
Total remaining due		$37,243.80

10. Defendant filed a counterclaim asserting that he had fulfilled all of his obligations under the purchase and sale agreement but that plaintiff breached his contract by selling large quantities of onion futures, delivering large quantities of onions on the futures market and selling cash onions in the country below established prices. An affidavit was filed by plaintiff specifically denying these asserted breaches of contract. Defendant has admitted in his amended answer that he has breached the terms of the contract by failing to make the initial cash payment of $15,000 and a second payment by January 10, 1956 of $10,000.

[fol. 48] CONCLUSIONS OF LAW

A. This Court has jurisdiction of the parties and of the subject matter herein by virtue of Section 1332 of the Judicial Code, Title 28 U. S. C. §1332.

B. There is no genuine issue as to any material fact involved in this controversy.

C. This is an action to enforce payment for goods sold to and received by defendant at a fair and reasonable price. The total amount due of $37,342.80 is undisputed.

As part of the purchase and sale agreement, plaintiff agreed not to deliver the remainder of the onions he owned on the futures market, but to merchandise them in normal trade channels. This condition was a reasonable restriction to assure defendant the enjoyment of the legitimate fruits of his contract of purchase. The agreement was valid and enforceable. Judgment will be entered in favor of plaintiff and against the defendant in the sum of $37,042.80 with interest at 5% from the date of judgment, together with costs.

D. Defendant has violated the terms of the purchase agreement by failing to make the initial payment when entering into the agreement and by failing to make the second payment on January 10, 1956. Defendant, having first breached the agreement, may not now counterclaim that plaintiff subsequently did not adhere to a condition of the contract. Furthermore, the counterclaim charges alleged breaches of conditions which were not part of the agreement between the parties as that agreement is defined in the complaint, amended answer and reply of the parties. The counterclaim of the defendant must be dismissed.

It is so ordered and counsel for plaintiff will submit an appropriate judgment order in accordance herewith.

Igoe, United States District Judge.

Dated: September 26, 1957.

[fol. 49]

IN UNITED STATES DISTRICT COURT

OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed October 11, 1957

Now comes the defendant, Jack H. Kelly, by his attorneys, Joseph W. Louisell and Richard E. Gorman, and for his objections to the proposed findings of fact and conclusions of law shows unto this Honorable Court as follows:

1. The defendant objects to proposed findings of facts 2, 3, 4, 8, 9 and 10 for the following reasons:

a. The files and records in the instant cause, including the various pleadings and affidavits, in no way support any of the above enumerated proposed findings of fact, but, to the contrary, said papers indicate that the above enumerated proposed findings of fact are totally erroneous, inaccurate and incomplete.

b. The Court, in granting a motion for a summary judgment, is not obligated to make any findings of fact whatsoever under the provisions of Rule 52(a) of the Federal Rules of Civil Procedure.

2. The defendant objects to proposed conclusions of law B, C, and D for the following reasons:

a. Proposed conclusions of law B, C, and D are predicated upon a gross misconception of the pertinent and applicable law governing the issues involved in the instant cause.

b. The Court, in granting a motion for summary judgment, is not obligated to make any conclusions of law whatsoever under the provisions of Rule 52(a) of the Federal Rules of Civil Procedure.

/s/ Joseph W. Louisell, 2366 Penobscot Building, Detroit 26, Michigan; /s/ Richard E. Gorman, 1 N. LaSalle Street, Chicago, Illinois, Attorneys for Jack H. Kelly, Defendant.

Dated: Chicago, Illinois, October 11, 1957.

[fol. 50]

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND GRANTING MOTION FOR SUMMARY JUDGMENT—October 11, 1957

You are hereby notified that Judge Igoe entered the following order on 10-11-57:

1. On his own motion, defendant given leave to file objections to Findings of Fact and Conclusions of Law instanter and said objections are overruled.

2. Enter Judgment order allowing plaintiff's motion for Summary Judgment. Enter Judgment in favor of plaintiff and against defendant in the sum of $37,342.80 with interest and costs. Execution to issue. Defendant's counterclaim is dismissed.—Draft.

Roy H. Johnson, Clerk.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed October 22, 1957

Notice is hereby given that Jack H. Kelly, defendant above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit, from the order dated October 11, 1957, granting plaintiff's motion for a summary judgment against the defendant in the sum of thirty-seven thousand, three hundred forty-two and eighty/hundredths ($37,342.80) dollars, with interest and costs, and dismissing the counterclaim of the defendant.

/s/ Joseph W. Louisell, 2366 Penobscot Building, Detroit 26, Michigan; /s/ Richard E. Gorman, 1 N. LaSalle Street, Chicago, Illinois, Attorneys for Defendant.

[fol. 51]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12190

September Term, 1957, April Session, 1958

VINCENT W. KOSUGA, Plaintiff-Appellee,

v.

JACK H. KELLY, Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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Before Major, Schnackenberg and Parkinson, Circuit Judges.

OPINION—June 23, 1958

Major, Circuit Judge. This is an appeal from a summary judgment in favor of appellee (plaintiff) against appellant (defendant), entered October 11, 1957, in the amount of $37,342.80, with interest and costs. The action was commenced September 11, 1956, and the judgment represents the balance due on a sale made December 17, 1955, by plaintiff to defendant, of fifty cars of onions.

If plaintiff was entitled to recover, there is no dispute as to the amount due as embodied in the judgment. The issues raised on this appeal require a statement of the salient facts which give rise thereto, as well as the essential proceedings in the District Court. The case was tried and decided upon the pleadings, which included plaintiff's complaint, defendant's answer thereto, certain affirmative defenses asserted by defendant, as well as a counterclaim

[fol. 52] by which defendant sought to recover damages against plaintiff in the amount of $75,000. There was submitted in connection with the counterclaim an affidavit by each of the parties.

On December 17, 1955, when the contract in dispute was made, plaintiff and his associate, Sam Siegel (the latter not a party to this action), were owners of actual onions in Chicago and elsewhere. Defendant was a grower of onions. Both parties were engaged in the marketing of onions in Illinois and in commerce generally throughout the country. By the terms of the contract plaintiff agreed to sell and defendant agreed to purchase fifty cars of onions at $960.00 per car, plus storage charges, or a total of $48,000; plus storage charges. The terms of sale were: initial cash payment, $300.00 per car, or $15,000; second payment to be made by January 10, 1956, of $200.00 per car, or $10,000; the balance of $460.00 per car, plus storage to be computed at the time defendant ordered the cars withdrawn from storage, or a total of $28,082.00. From time to time, defendant withdrew from storage thirteen cars of onions. The payments made by defendant consisted of $7,500 on December 22, 1955, and $5,000 on January 18, 1956, or a total payment of $12,500. No further payments were made as provided for in the agreement or for the thirteen cars of onions withdrawn by defendant from storage.

Onions, due to their perishable nature, can be kept in storage only for a reasonable period. On February 16, 1956, plaintiff sent a telegram to defendant, as follows:

> "Storage onions you purchased from me on 12-17-55 now showing deterioration. You agreed to order out of Chicago storage and pay for these onions during January and early February 1956. Present condition of onions require immediate action. Demand payment by 2-20-56 and will surrender negotiables upon receipt of payment."

On the same date, plaintiff wrote defendant, which in general was confirmatory of the telegram. On February 20, 1956, defendant responded by telegram, as follows:

"Our agreement does not provide that onions be withdrawn from storage in substantial quantity by early February. We intend to abide by the original agreement and we expect you to do likewise."

[fol. 53] Defendant, on March 9, 1956, notified plaintiff that he would withdraw no further onions from storage and that he would make no further payments. The reasons for such refusal will be subsequently noted under defendant's affirmative defenses.

The facts so far stated are conceded by defendant. In connection therewith it is pertinent to note that defendant makes no contention, either by allegation or otherwise, but that the price which he agreed to pay for the onions was the fair and reasonable cash market price. For reasons asserted in the affirmative defenses, defendant contends that payment of the balance due on the contract cannot be judicially enforced. Such defenses are predicated upon an alleged factual situation from which it is argued that there was incorporated in and made a part of the sale agreement certain conditions in violation of anti-trust laws; both Federal and State (Illinois), as well as the Commodity Exchange Act. These affirmative defenses were, on motion of plaintiff, stricken by the court. We need cite no authority for the well established rule that all facts well pleaded must be taken as true. This is so even though plaintiff by answer has in large part denied defendant's allegations.

We find it difficult, as is often the case under similar circumstances, to separate facts well pleaded from those of a conclusory and argumentative nature. It appears, however, that the essential allegation of fact is that referred to as the non-delivery provision asserted to have been made at the same time and in connection with the sale of the onions. It appears from the briefs that each of the parties recognizes this provision as furnishing the principal bone of contention. Relative thereto, it is stated in defendant's brief that it was agreed by the parties that "the plaintiff and Sam Siegel would not deliver any onions on the futures market for the balance of the 1955-1956 trading season" (referring to onions owned and controlled

by plaintiff and Siegel other than those involved in the sale to defendant), and that the defendant and other onion growers "agreed to purchase the 287 carloads of onions [this includes the 50 cars purchased by defendant] and to desist from selling them upon the futures market for the balance of the trading season in consideration of the [fol. 54] promise of the plaintiff and Sam Siegel not to deliver any of the onions owned, held or controlled by them on the futures market for the balance of the 1955-1956 trading season."

It is alleged as a legal conclusion, "The avowed and express object of said agreement was to fix the price of onions and limit the amount of onions sold in the State of Illinois, to fix and manipulate the market price of onions and to stabilize said price and, if possible, to increase their price, said onions being a part of interstate commerce, and to create a false and fictitious market condition." In connection with this non-delivery provision, it is pertinent to note that each of the parties remained free to merchandise onions in normal commercial trade channels.

The District Court in a memorandum opinion reasoned that the Sherman Anti-Trust Act could not be asserted as a defense to the action for the unpaid balance of the purchase price, principally upon three grounds: (a) the so-called condition of non-delivery was not an inherent part of the sale and, thus, assuming the reciprocal agreement not to sell onions on the futures market during the balance of the 1955-1956 trading season was illegal, the obligation of defendant to pay was supported by other lawful consideration, to-wit, plaintiff's promise to sell the fifty carloads of onions at an agreed price; (b) the remedies provided by the Sherman Anti-Trust Act are exclusive and do not afford defendant the affirmative defense asserted, and (c) the so-called condition of non-delivery was not an illegal restraint of trade condemned by the Sherman Act.

In support of his position, plaintiff places great reliance upon *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, while defendant places equal reliance upon *Continental Wall Paper Company* v. *Louis Voight and Sons Company*, 212 U.S. 227. *Connolly* involved an action to recover the price

of sewer pipe sold and delivered to defendant. The defense asserted that plaintiff was part of a monopolistic conspiracy and combine for the express purpose of limiting production of sewer pipe and increasing the market price thereof, that the sale involved was at prices fixed by the monopoly in violation of the Sherman Act and, therefore, [fol. 55] unenforceable. The Court, in holding the defense not available, stated (page 551):

> "The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies, and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid."

Continental involved an action to recover the alleged balance on an account for merchandise sold and actually delivered. Defendant as one of its defenses asserted that it, along with plaintiff and other corporations, was a party to an agreement, combination and conspiracy in restraint of trade in violation of the Sherman Anti-Trust Act and that the contract of sale was an inherent part of the illegal scheme. The Court sustained the validity of the defense, with a dissenting opinion by four members. The Court at great length distinguished the *Connolly* case, and discussed the situation before it as a basis for a holding contrary to that of *Connolly*, concluding such discussion as follows (page 260):

> "In short, the defense in the *Connolly* Case was that the plaintiff corporation, although owning the pipe in question and having authority to sell and pass title to the property, was precluded by reason *alone* of its illegal character from having a judgment against the purchaser. We held that that defense could not be sustained either upon the principles of the common law or under the Anti-Trust Act of Congress."

In *Continental,* both plaintiff and defendant were admittedly members of a combination and conspiracy in [fol. 56] violation of the Anti-Trust Act. The Court emphasizes the particularly vicious nature of the violations in which the parties were engaged. As descriptive thereof the Court quotes from the Court of Appeals as follows (page 256):

> "'The conspiring mills were situated in many States. The consumers [of wall paper] embraced the whole citizenship of the United States. The jobbers and wholesalers, who were to be coerced into contracts to buy their entire demands from the Continental Wall Paper Company or be driven out of business, were in every State. Before the combination each of the combining companies was engaged in both state and interstate commerce. The freedom of each, with respect to prices and terms, was restrained by the agreement and interstate commerce directly affected thereby, as well as by the enhancement of prices which resulted. A more complete monopoly in an article of universal use has probably never been brought about. It may be that the wit of man may yet devise a more complete scheme to accomplish the stifling of competition. But none of the shifts resorted to for suppressing freedom of commerce and securing undue prices, shown by the reported cases, is half so complete in its details. None of the schemes with which this may be compared is more certain in results, more widespread in its operation, and more evil in its purposes.'"

After all is said and done, the essential distinction between *Connolly* and *Continental* is that in the former

plaintiff was engaged in a rather innocuous form of violation of the anti-trust laws to which defendant, as buyer, was not a party, while in *Continental* plaintiff was engaged in a vicious form of anti-trust violation and defendant, as buyer, was a party to plaintiff's unlawful activities. It is also important that in *Connolly* recovery was sought for the fair and reasonable price of goods sold, while in *Continental* recovery was sought for the price which resulted from and was determined by the terms of the conspiracy in which the parties were participants. In the former, defendant was not permitted to plead plaintiff's anti-trust violation as a defense, while in the latter the same defense asserted by defendant was sustained. Thus, these two cases, as defendant would have them [fol. 57] applied, lead to the incongruous result that a Court will lend its aid to enforce payment by a buyer innocent of wrongdoing but will deny its aid to enforce payment by a buyer who is a wrongdoer, that is, a party to and a part of a combination engaged in anti-trust violations. A reading of the cases subsequent to *Continental* demonstrates that the Court generally, while recognizing its rationale, have in the main limited the case to its particular vicious facts. Its application has been denied under a variety of circumstances.

In *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U.S. 165, the Court rejected the defense of alleged violation of the Anti-Trust Acts. In doing so, we think it enlarged the doctrine of *Connolly* and at the same time limited that of *Continental.* The action was brought to recover the price of glucose sold to defendant. In defense it was claimed that plaintiff was part of a monopoly which had advanced the price of glucose and set up a profit-sharing plan under which purchasers were required to buy all of their requirements from the combine, thus restraining competition in violation of the Sherman Act. The contract of sale permitted the purchaser to share in a profit-sharing plan of the seller, on condition that the purchaser use the seller's glucose exclusively. It was specifically provided in the contract for sale, "Goods herein sold are for your own consumption and not for resale." Thus, defendant (buyer) was by agreement with plaintiff (seller)

restricted in its right to purchase as well as in the use of the purchased product.

The Court affirmed the action of the lower Court in striking the answer as being no defense, affirmed judgment for the price of the goods sold, and stated (page 172):

> "* * * the sale and the obligations which arose from it depended upon a distinct contract with reciprocal considerations moving between the parties,—the receipt of the goods on the one hand and the payment of the price on the other. And this is but a form of stating the elementary proposition that courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so or some remote aid to the accomplishment of a wrong which might pos- [fol. 58] sibly result—doctrines of such universal acceptance that no citation of authority is needed to demonstrate their existence, especially in view of the express ruling in *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 46 L.Ed. 679, 22 Sup.Ct.Rep. 431, applying them to the identical general question here involved."

The Court continued (page 172):

> "The case therefore reduces itself to the question whether the contract of sale was inherently illegal so as to bring it within the also elementary rule that courts will not exert their powers to enforce illegal contracts or to compel wrongdoing. The only suggestion as to the intrinsic illegality of the sale results from the averments of the answer as to the offer of a percentage of profits upon the condition of dealing exclusively with the Refining Company for the following year and the clause to the effect that the goods were bought by the Manufacturing Company for its own use and not for resale. But we can see no ground whatever for holding that the contract of sale was illegal because of these conditions."

In *Wilder*, the *Continental* case was relied upon in support of the defense, as it is here. Relative thereto, the Court stated (page 177):

"But it is apparent on the face of the opinion in the *Continental Wall Paper* Case that it affords no ground for the extreme and contradictory conclusion thus deduced from it since the ruling in that case was based not upon any supposed right to import into a legal and valid contract elements of wrong which there was no right to consider, but was rested exclusively upon elements of illegality inhering in the particular contract of sale in that case which elements of illegality may be thus summarized: (a) the relations of the contracting parties to the goods sold, (b) the want of real ownership in the seller, (c) the peculiar obligations which were imposed upon the buyer, and (d) the fact that to allow the nominal seller to enforce the payment of the price would have been in and of itself directly to sanction and give effect to a violation of the Anti-Trust Act inhering in the sale."

[fol. 59] It seems to us that the reasoning of the Court in *Wilder*, and particularly the appraisement which it made of its former opinion in *Continental*, is highly pertinent to the instant situation. Here, as in *Wilder*, there was a contract of sale. Plaintiff was to receive and defendant was to pay the fair market value of the onions. Assuming that which we think doubtful, that is, that the non-delivery agreement was illegal, there is no more reason here than there was in *Wilder* for importing such elements of wrong into an otherwise legal and valid contract. More than that, the instant action is not to enforce the non-delivery provision but to enforce defendant's promise to pay. Such enforcement, as stated in *Wilder* (page 177), will not "sanction and give effect to a violation of the Anti-Trust Act inhering in the sale." This principle has been reaffirmed in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743. In that case it was stated (page 755) that the Court would entertain a defense that the contract is illegal only where the suit "has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought. * * *." See also *United States Hoffman Machinery Corp.* v. *Valeteria Cleaners, Inc.*, 143 F. Supp. 797, 799.

Defendant challenges and seeks to distinguish the cases which we have discussed by arguing that the non-delivery

provision of the contract was an integral part thereof, in other words, that because of such provision the entire contract is tainted with illegality and no part of it is enforceable. We do not agree with the premise upon which this contention rests. The non-delivery provision, while a part of the same contract, is separable from and not inherent in defendant's promise to pay the reasonable market price for the onions. A case in point is *Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Co.* v. *Bay*, 200 U.S. 179. In that case, the Court separated the legal from the illegal covenant and enforced the lawful promise made for adequate consideration even though an unlawful promise was made at the same time for the same consideration. In reference to one facet of the unlawful portion of the contract which appears to have been a price fixing condition, the Court stated (page 185):

> "It only remains to say a word as to the agreement to maintain rates. This is a covenant by the purchaser, the plaintiff in error. It is not the covenant [fol. 60] sued upon. It is not declared to enter into the consideration of the sale. If necessary, we should be astute to avoid allowing a party to escape from his just and substantially legal undertaking on such ground."

Defendant also relies upon the Commodity Exchange Act (7 U.S.C. Par. 5, 13). It is contended that the contract in suit is in violation of that Act on the basis that the non-delivery provision created a "false and fictitious" market condition in onions by manipulation and increase in price. The contention with reference to this Act parallels that relative to the Federal Anti-Trust Act. Our discussion in connection with that Act is equally pertinent. In our judgment, and we so hold, the affirmative defenses predicated upon the Federal Anti-Trust Act and the Commodity Exchange Act are not available to defendant and such defenses were properly stricken by the District Court.

Defendant as a further affirmative defense also relies upon the Anti-Trust Act of Illinois (Chap. 38, Sec. 569, *et seq.*, Smith-Hurd Illinois Ann. Stat.). Section 573 de-

clares that any contract or agreement in violation thereof shall be absolutely void. Section 574 provides that a purchaser of a commodity contrary to the provisions of the Act may plead the Act as a defense to any suit for the recovery of such price. Thus, the Illinois Act, unlike the Federal Act, specifically provides that a violation of the Act may be pleaded as a defense. The Illinois Act as the substantive law of the State is applicable only to intrastate commerce. Defendant apparently so recognizes and argues that such commerce was involved inasmuch as the contract of sale was made and was to be performed in the State of Illinois. Defendant makes this argument in spite of the frequent allegations in his pleadings that "said onions which were the subject of said agreement and contract were a part of interstate commerce." In 15 C.J.S. Sec. 133 (b), it is stated that "state anti-trust laws do not apply to transactions involving interstate commerce * * *." It is hardly open to doubt but that the transaction in issue involved interstate commerce. It is, therefore, our view that the Illinois Act is without application.

[fol. 61] Furthermore, the Illinois provision which makes a violation available as a defense has been narrowly construed by this Court. *Chicago Wall Paper Mills* v. *General Paper Co.*, 147 Fed. 491. We held that the defense could not be raised in an action for the recovery of the purchase price of goods where it was not sought to enforce the illegal condition. We reasoned that the illegal covenant should, where possible, be separated from the valid promise to pay for the goods sold. As already shown, the Federal Courts have permitted recovery based upon the same reasoning.

We may add that a reading of the Illinois cases is convincing that the transaction in dispute is not violative of the Illinois Act, even though its applicability be assumed. In *Match Corp. of America* v. *Acme Match Corp.*, 285 Ill. App. 197, 204, the Court stated:—

> "All contracts which on their face place a restriction upon the acts of the other party to the contract are necessarily a restraint to a certain extent. If the effect does not destroy competition and is merely intended

to increase the business of the parties to the contract, and is only incidental to and found necessary in order to protect the parties' interest as set forth in the contract and does not tend to promote a monopoly, such provisions do not make the contract illegal and void."

See also *Moody & Waters Co.* v. *Case-Moody Pie Corp. et al.*, 354 Ill. 82, and *Southern Fire Brick and Clay Co.* v. *Garden City Sand Co. et al.*, 223 Ill. 616.

Lastly, defendant contends that its counterclaim was improperly dismissed. In this claim it was alleged that plaintiff violated the non-delivery provision of the contract by delivering onions on the futures market during the balance of the 1955-1956 trading season and that plaintiff disrupted the cash market of onions by selling and delivering unusual quantities below the prevailing price. The counterclaim does not allege when this alleged breach on the part of plaintiff took place. Plaintiff in support of his denial of a breach submitted an affidavit which accounted for the fifty carloads contracted for by defendant. The affidavit shows that on or about February 7, 1956, thirteen car- [fol. 62] loads were withdrawn from storage by defendant; March 19, 1956, fourteen carloads were sold by plaintiff to Campbell Soup Company, and at a later date eight carloads were sold for cash to other onion brokers, leaving in storage fifteen carloads which had deteriorated to the extent that they could not be sold and were abandoned. Neither the manner of disposal of these onions by plaintiff nor the time is disputed by defendant.

The short and fatal answer to defendant's contention is that he first breached the contract. As heretofore shown, defendant agreed to an initial cash payment of $15,000, and a second payment of $10,000 by January 10, 1956. However, the total payment made by him was $12,500. Thus, defendant was in continuous default and breach of the contract from and after January 10, 1956. It is a well established principle that a party to a contract who commits the first breach of its terms cannot maintain an action for a subsequent breach by the other party. *Realty Acceptance Corp.* v. *Montgomery*, 51 F.2d 636, 640;

Raybestos-Manhattan, Inc. v. *Asbestos Textile Co. et al.*, 79 F.2d 634, 637; *Sonken-Galamba Corp. et al.* v. *Butler Iron & Steel Co.*, 119 F.2d 283, 286. Moreover, it must be remembered that on March 9, 1956, defendant notified plaintiff that he would withdraw no further onions from storage and that he would make no further payments. At that time plaintiff was charged with the obligation of disposing of the onions at the best price available in mitigation of damages sustained by reason of defendant's breach. There is no allegation in the pleadings or affidavits that plaintiff acted improperly in the discharge of this obligation. In fact, as noted, plaintiff's affidavit, which is not denied, demonstrates that the onions (other than the thirteen cars for which delivery was accepted by defendant) were disposed of by plaintiff subsequent to the time when defendant refused to accept further delivery, and that defendant was given credit for the amount so realized. In our view, defendant's counterclaim failed to state an action upon which he was entitled to relief, and the claim, together with the answer thereto and affidavits submitted by the parties, demonstrates that there was no material issue of fact raised or involved.

[fol. 63] In our judgment and we so hold, the District Court committed no error in striking the affirmative defenses pleaded by defendant or in dismissing his counterclaim. The judgment appealed from is

Affirmed.

[fol. 64]

IN UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before:

HON. J. EARL MAJOR,
HON. ELMER J. SCHNACKENBERG,
HON. W. LYNN PARKINSON,

Circuit Judges.

No. 12190

VINCENT W. KOSUGA, Plaintiff-Appellee,

vs.

JACK H. KELLY, Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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JUDGMENT—June 23, 1958

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed with costs, and interest from the date of judgment of the said District Court until paid, at the same rate that similar judgments bear in the courts in the State of Illinois.

[fol. 65] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 66]

SUPREME COURT OF THE UNITED STATES

No. 267, October Term, 1958

JACK H. KELLY, Petitioner,

vs.

VINCENT W. KOSUGA.

ORDER ALLOWING CERTIORARI—October 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT, U. S.

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

No. 267

JACK H. KELLY,
Petitioner,
v.
VINCENT W. KOSUGA,
Respondent.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

No. .....

JACK H. KELLY,
Petitioner,
v.
VINCENT W. KOSUGA,
Respondent.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Jack H. Kelly, by his attorneys, Joseph W. Louisell and Ivan E. Barris, respectfully prays for the issuance of a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit affirming the summary judgment rendered in favor of the respondent by the United States District Court for the Northern District of Illinois, Eastern Division.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at ... F. 2d ... (1958).[1]

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit, review of which is herein sought, was entered on the 23rd day of June, 1958.

Jurisdiction of this Honorable Court is invoked under Section 1254 of Title 28 U. S. C. A., the pertinent provisions of which read:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> "(2) • • •;
>
> "(3) • • •."

QUESTION PRESENTED

Whether the District Court of the United States for the Northern District of Illinois, Eastern Division, and the United States Court of Appeals for the Seventh Circuit erred in holding that the petitioner's affirmative defense, alleging a violation of the Sherman Anti-Trust Act of 1890, was insufficient, within the meaning of Rule 12(f) of the Federal Rules of Civil Procedure and thus properly

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[1] As of the time of the printing of this Petition for Writ of Certiorari, the Opinion of the United States Court of Appeals for the Seventh Circuit was not published.

stricken, where the respondent and the petitioner were both parties to an agreement whose purpose was to fix prices with respect to a commodity which was a part of interstate commerce and where the respondent was seeking to invoke the aid of the Federal District Court to enforce the very agreement which constituted, in itself, a violation of the Sherman Anti-Trust Act of 1890.

STATUTORY PROVISIONS INVOLVED

Section 1, Title 15, of the United States Code provides, in pertinent portions:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court * * *."

STATEMENT OF THE CASE

(Unless otherwise clearly shown by the context, figures in parentheses refer to corresponding pages of petitioner's Appendix heretofore filed with the United States Court of Appeals for the Seventh Circuit.)

The respondent, hereinafter referred to as plaintiff, commenced action against the petitioner, hereinafter referred to as defendant, in the United States District Court for the Northern District of Illinois, Eastern Division, hereinafter referred to as District Court, on September 11, 1956. The suit, predicated upon diversity of citizenship (United States Code, Title 28, Section 1332), was brought

to recover the sum of $37,342.80, which allegedly represented the unpaid balance of the purchase price of fifty (50) carloads of onions sold by the plaintiff to the defendant at the unit price of $960.00 per car, plus storage charges (App. 3a-10a). On March 22, 1957 the defendant filed an Amended Answer, which set up, *inter alia*, certain Affirmative Defenses and also a Counterclaim (App. 11a-19a). Plaintiff then filed a Motion to Strike the Affirmative Defenses in addition to a Reply to the Amended Answer (App. 19a-23a).

The District Court, in pursuance of its Memorandum Opinion of April 24, 1957 (App. 23a-28a), granted the Motion to Strike Affirmative Defenses (App. 28a) and subsequently, on August 15, 1957, denied defendant's Motion for Reconsideration (App. 29a-36a) and reaffirmed its ruling striking the Affirmative Defenses (App. 37a). A Motion for Summary Judgment, filed by plaintiff on August 22, 1957 (App. 38a-42a), and opposed by the defendant (App. 42a-44a), was granted on October 11, 1957 (App. 50a). Judgment in the amount of $37,342.80 with interest and costs was entered on the Complaint in favor of the plaintiff and against the defendant, whereas the defendant's Counterclaim was dismissed (App. 50a).

The plaintiff alleged (App. 3a; Paragraph 3 of Complaint) and the defendant admitted (App. 11a; Paragraph 3 of Amended Answer) that on December 17, 1955, the plaintiff sold to the defendant fifty (50) carloads of United States No. 1 grade yellow globe onions in Chicago storage at $960.00 per car, plus storage charges incurred after the sale. The plaintiff alleged (App. 3a, 4a; Paragraph 4 of Complaint) and the defendant admitted (App. 12a, 13a; Paragraph 4 of Amended Answer) that only the sum of $12,500.00 was paid on the account. The plaintiff sued for the unpaid balance, plus storage charges,

minus the sum realized upon the sale of the thirty-seven (37) cars of onions which had not been withdrawn from storage by the defendant, the total amount sought being $37,342.80 (App. 4a, 5a; Paragraphs 5, 6, 7, 8 and 9 of Complaint.)

The defendant, in his Affirmative Defenses (App. 14a-16a; Paragraph 1 through 8 of Affirmative Defenses) and in certain other affirmative allegtaions contained in the Amended Answer (App. 11a-13a; Paragraphs 3 and 4 of Amended Answer) assumed the legal position that the contract of sale was illegal and that, accordingly, the plaintiff, being *in pari delicto,* could not invoke the assistance of the Court to recover the unpaid portion of the purchase price, plus storage charges (App. 16a; Paragraph 9 of Affirmative Defenses). Succinctly stated, the following allegations of fact were embodied in the Affirmative Defenses and in other affirmative allegations contained in the Amended Answer:

The plaintiff and his associate Sam Siegel, who possessed or controlled some one thousand (1000) cars of onions in cold storage in the area of Chicago, Illinois, and in storage in the country, informed the defendant and other onion growers during the months of November and December 1955, that unless the defendant and the other onion growers purchased a large portion of the onions owned by the plaintiff, the plaintiff and Sam Siegel would deliver large quantities of onions on the futures exchange for the purpose of depressing both the futures and cash market price of onions (App. 14a, 15a; Paragraph 1 of Affirmative Defenses). The defendant and the other onion growers, fearful of the economic consequences which might befall them in the event the onion market were to be flooded, entered into an agreement with the plaintiff and Sam Siegel to purchase from them two hundred and

eighty-seven (287) carloads of onions, of which the defendant's share was fifty (50) carloads (App. 15a, 11a, 12a; Paragraph 4 of Affirmative Defenses, Paragraph 3 of Amended Answer.) In consideration for the promises of the defendant and of the other onion growers to purchase the two hundred and eighty-seven (287) carloads of onions from the plaintiff and Sam Siegel and to refrain from selling said onions upon the futures market for the balance of the 1955-1956 trading season, the plaintiff and Sam Siegel promised and agreed that they likewise would forbear from selling any onions owned, held or controlled by them upon the futures market for the balance of the trading season (App. 15a, 11a, 12a, Paragraph 3 of Affirmative Defenses; Paragraph 3 of Amended Answer), with it being the express and avowed purpose and object of the agreement, combination, and conspiracy to fix the price and limit the amount of onions to be sold in the State of Illinois (App. 16a; Paragraph 6 of Affirmative Defenses), to create "a false and fictitious market condition" (App. 12a; Paragraph 3 of Amended Answer), and to fix and manipulate the market price of onions and to stabilize said price and, if possible, increase said price (App. 16a; Paragraphs 5 and 8 of Affirmative Defenses), said onions being a part of interstate commerce (App. 16a; Paragraphs 7 and 8 of Affirmative Defenses).

Appeal to the United States Court of Appeals for the Seventh Circuit, hereinafter referred to as Circuit Court, was taken on October 22, 1957 from the District Court's rulings striking the Affirmative Defenses from the Amended Answer and granting the Motion for Summary Judgment with respect to both the Complaint and the Counterclaim (App. 50a). The Opinion and Judgment of the Circuit Court, affirming the holding of the District Court, was filed on June 23, 1958, a true copy of said Opinion being annexed hereto as Appendix A.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Section (b) of Rule 19 of the Supreme Court Rules includes, as a consideration governing review on certiorari, a situation where a Court of Appeals has "decided a Federal question in a way in conflict with applicable decisions of this Court." It is submitted that the decision of the Seventh Circuit Court of Appeals in the instant cause is in conflict with the decision of this Court in *Continental Wall Paper Co. v. Louis Voight and Sons Co.*, 212 U. S. 227, 29 S. Ct. 280 (1908). It is submitted that the interpretation given the *Continental* case, *supra,* by the Court of Appeals below can not be reconciled with either the rationale or the result heretofore announced by this Court. Squarely presented, therefore, on this petition, is the question of whether the rule and the rationale of the *Continental* case are still binding upon the inferior United States Courts, or whether subsequent decisions of this Court have by implication renounced the proposition for which the *Continental* case, *supra,* has stood.

ARGUMENT

Summary of Argument

WHERE THE PLAINTIFF AND THE DEFENDANT ARE BOTH PARTIES TO AN AGREEMENT, COMBINATION, AND CONSPIRACY TO FIX PRICES WITH RESPECT TO A COMMODITY WHICH IS A PART OF INTERSTATE COMMERCE AND WHERE A CONTRACT OF SALE WAS INTENDED BY SAID PARTIES TO BE AND WAS, IN FACT, AN INTEGRAL PART OF THE ILLEGAL SCHEME, THE DEFENDANT, AS THE PURCHASER, MAY ASSERT THE DEFENSE OF ILLEGALITY, PREDICATED UPON THE SHERMAN ANTI-TRUST ACT OF 1890, TO THE ACTION OF THE PLAINTIFF, AS THE SELLER, TO RECOVER DAMAGES RESULTING FROM THE DEFENDANT'S REFUSAL TO TAKE DELIVERY OF THIRTY-SEVEN (37) CARLOADS OF ONIONS AND TO PAY THE OUTSTANDING BALANCE UPON THE PURCHASE PRICE

The District Court, upon motion of the plaintiff (App. 19a, 20a), struck from the Amended Answer the Affirmative Defenses and certain allegations contained in the Amended Answer relating, *inter alia,* to the defense that the plaintiff could not recover the unpaid balance of the purchase price since the contract of sale with respect to the onions in question, being violative of the Sherman Anti-Trust Act of 1890 (U. S. Code, Title 15, Section 1) was unenforceable (App. 37a). In determining whether the District Court erred in making such a ruling and whether the Circuit Court erred in affirming the ruling of the District Court, this Honorable Court, as it previously was incumbent upon said District Court and said Circuit Court, must ascertain whether an "insufficient" defense, within the contemplation of Rule 12(f) of the Federal Rules of Civil Procedure, was alleged, always keeping in mind the fundamental principle that, upon a motion to strike, all

facts well pled by the defendant must be deemed to be true (*Town of River Junction v. Maryland Casualty Co.*, 110 F. 2d 278 (C. C. A. 5) (1940); *Barnidge v. United States*, 101 F. 2d 295 (C. C. A. 8) (1939); *Barron and Holtzoff, Federal Practice and Procedure*, Rules Edition, Volume I, Section 369, published in 1950).

Hence, in accordance with the above stated principle of law, it must be assumed, for the purpose of determining whether a sufficient defense was alleged, that:

(1) The plaintiff and one Sam Siegel, during the months of November and December, 1955, had in their possession or under their control some 600 carloads of onions in cold storage in the area of Chicago, Illinois and an additional 400 carloads of onions in storage in the country (App. 14a, 15a, Paragraph 1 of Affirmative Defenses) and plaintiff and his associate, Sam Siegel, represented to the defendant and to other persons who dealt in or grew onions that they, the plaintiff and Sam Siegel, owned said onions (App. 11a, 12a, Paragraph 3 of Amended Answer).

(2) During the months of November and December, 1955, the plaintiff and Sam Siegel called three meetings in Chicago, Illinois for the purpose of determining whether the defendant and certain other growers of onions who possessed large quantities of onions in the country which were customarily sold through normal trade channels would agree to take and merchandise a portion of the 600 carloads of onions owned or controlled by the plaintiff and Sam Siegel in cold storage in Chicago, Illinois (App. 11a, Paragraph 2 of Amended Answer; App. 14a, 15a, Paragraphs 1 and 2 of Affirmative Defenses).

(3) At said meetings plaintiff and Sam Siegel represented to the defendant and the other onion growers that

unless the defendant and the other onion growers purchased a large portion of the onions owned by the plaintiff, the plaintiff and Sam Siegel would deliver large quantities of onions on the futures exchange for the avowed purpose of depressing both the futures and cash market price of onions (App. 14a, 15a; Paragraph 1 of Affirmative Defenses).

(4) The defendant and the other onion growers feared that the delivery on the futures exchange of a large quantity of storage onions would seriously depress both the futures and the cash onion market, with attendant devastating economic consequences to them (App. 15a; Paragraph 1 of Affirmative Defenses).

(5) At the second of said meetings, held on December 1, 1955 in Chicago, Illinois, the plaintiff and Sam Siegel agreed with the defendant and other onion growers that if the defendant and the other onion growers would purchase a portion of the 600 carloads of onions, the plaintiff and Sam Siegel would not deliver any onions on the futures market for the balance of the 1955-1956 trading season (App. 15a; Paragraph 3 of Affirmative Defenses) and the defendant and the other onion growers, for their part, agreed to purchase from the plaintiff and Sam Siegel 287 carloads of onions (App. 15a; Paragraph 4 of Affirmative Defenses).

(6) The defendant, as part of an overall program and as one facet of an overall agreement entered into between the plaintiff and Sam Siegel and the defendant and other onion growers, whereby the latter parties agreed to purchase the 287 carloads of onions and to desist from selling them upon the futures market for the balance of the trading season in consideration of the promise of the plaintiff and Sam Siegel not to deliver any of the onions owned, held or controlled by them on the futures market for the

balance of the 1955-1956 trading season, agreed to purchase fifty (50) carloads of onions from the plaintiff and Sam Siegel (App. 11a, 12a; Paragraph 3 of Amended Answer).

(7) The avowed and express object of said agreement was to fix the price of onions and limit the amount of onions sold in the State of Illinois (App. 16a; Paragraph 6 of Affirmative Defenses) to fix and manipulate the market price of onions and to stabilize said price and, if possible, to increase their price, said onions being a part of interstate commerce (App. 16a; Paragraphs 5, 7 and 8 of Affirmative Defenses), and to create a false and fictitious market condition (App. 12a; Paragraph 3 of Amended Answer).[2]

The issue to be resolved scarcely presents a matter of first impression, but rather it may be decided by applying the clear legal principles which were laid down by this

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[2] The Circuit Court, in its Opinion (see Pages 4a, 5a of Appendix A), stated that the allegation "the avowed and express object of said agreement was to fix the price of onions and limit the amount of onions sold in the State of Illinois, to fix and manipulate the market price of onions and to stabilize said price and, if possible, to increase their price, said onions being a part of Interstate Commerce, and to create a false and fictitious market conditon" was a concluson of law, rather than an allegation of fact. Counsel for defendant vigorously take issue with this interpretation. *Webster's New International Dictionary*, at page 160, defines the word "avowed" as meaning "openly acknowledged or declared" and, at page 773, defines the word "express" as meaning "directly and distinctly stated." The plaintiff and Sam Siegel had made it abundantly clear to the defendant and other onion growers that if they did not purchase a large portion of the onions then owned by the plaintiff and Sam Siegel, the plaintiff and Sam Siegel would "dump" large quantities of onions on the futures exchange in order to depress the futures and cash market price of onions (App. 14a, 15a). Confronted with the prospect of economic catastrophy, the defendant and other onion growers agreed to purchase some 287 carloads of onions from the plaintiff and Sam Siegel (App. 11a, 12a, 15a), with it being, as alleged, the actual object or, to use a synonym, purpose of the parties to fix the price of onions in order to stabilize their price or, if possible, in order to increase their price.

Honorable Court in the case of *Continental Wall Paper Co. v. Louis Voight and Sons Co.*, 212 U. S. 227, 29 S. Ct. 280. (1908), principles which the Circuit Court held to be inapplicable to the factual situation presented (see Pages 5a-10a of Appendix A). The Circuit Court, instead, by the simple, although erroneous, process of misconstruing the *ratio decidendi* of the *Constinental* case, *supra,* held that the instant cause is controlled by the holdings of this Court in the case of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 S. Ct. 431 (1902), and in its progenies, *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U. S. 165, 35 S. Ct. 398 (1915); *Small Co. v. Lamborn & Co.*, 267 U. S. 238, 45 S. Ct. 300 (1925); *Bruce's Juices, Inc. v. American Can Co.*, 330 U. S. 743, 67 S. Ct. 1015 (1947).

A reading of the *Continental* case, *supra,* pertinent extracts of which are set out below, as well as a reading of the other four cases above mentioned, leads inexorably to the conclusion that the factual situation herein presented closely parallels that which is found in the former case and that its rationale is dispositive of the question under discussion.

In the *Continental* case, *supra,* the plaintiff brought an action against the defendant to recover the sum of $56,762.10, the alleged balance on an account for merchandise sold and actually delivered. The defendant, as one of its defenses, asserted that it, along with the plaintiff and other corporations, was a party to an agreement, combination and conspiracy in restraint of trade in violation of the Sherman Anti-Trust Act of 1890 and that the contract of sale was an inherent part of the illegal scheme. The plaintiff's demurrer to this defense was overruled by the trial court, which entered judgment for the defendant, and the ruling of the trial court was upheld by the Circuit Court of Appeals (*Continental Wall Paper Company v. Louis*

Voight and Sons Company, 148 F. 939 (C. C. A. 6) (1906). In affirming the judgment the Supreme Court, speaking through Justice Harlan, first distinguished the *Connolly* case, *supra:*

> "But it is contended that however illegal the combination represented by the plaintiff may be, and whatever may be the effect of a judgment against the defendant, the plaintiff company is entitled to a judgment under the principles announced in *Connolly v. Union Sewer Pipe Co.,* 184 U. S. 540, 545, 46 L. ed. 679, 684, 22 Sup. Ct. Rep. 431. Let us see what that case was and whether it may not be distinguished from the one now before us.
>
> "The Union Sewer Pipe Company, a corporation of Ohio, doing business in Illinois, brought suit against Connolly, a citizen of Illinois, upon promissory notes given in Illinois, on account of the purchase by the defendant from that company, under contracts made in that state, of sewer pipe known as Akron pipe. It also brought suit against one Dee, a citizen of Illinois, upon an open account for the value of similar sewer pipe sold to him under a written contract, also made in that state. In each case the defendant disputed his liability for the value of the goods obtained from the Sewer Pipe Company upon the ground that, at the time of their respective purchases, that company was in a combination with certain firms, corporations, and companies engaged in the manufacture of Akron pipe, which combination, it was alleged, was in illegal restraint of trade, and forbidden by the principles of the common law, as recognized and enforced both in Ohio and Illinois. The defense was also made that the Sewer Pipe Company was a combination doing business throughout the United States and between Ohio and Illinois, in the form of a trust, in restraint of trade and commerce among the several states, contrary not only to the anti-trust act of Congress of July 2d, 1890, chap. 647, but contrary to the Illinois anti-trust statute of

January 1st, 1893, forbidding, under penalties, the combination of capital, skill, or acts for certain specified purposes. 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200. Ill. Laws 1893, p. 182; Hurd's Rev. Stat. (Ill.) 1899, p. 618, title 'Criminal Code'.

"The defense based upon the principles of the common law was overruled in the Connolly case, the court saying: 'Assuming, as defendants contend, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that they could, at common law, refuse to pay for pipe bought by them under special contracts with the plaintiff. The illegality of such combination did not prevent the plaintiff corporation from selling pipe that it obtained from its constituent companies, or either of them. It could pass a title by a sale to anyone desiring to buy, and the buyer could not justify a refusal to pay for what he bought and received by proving that the seller had previously, in the prosecution of its business, entered into an illegal combination with others in reference, generally, to the sale of Akron pipe.' Again, after referring to several cases establishing the general principle that a court will not lend assistance to carry out the terms of an illegal contract, and that one purchasing and receiving goods under a contract, expressed or implied, to pay for them, cannot refuse to pay simply because of the illegal character of his vendor, the court proceeded: 'In the present (Connolly) case other considerations must control. This is not an action to enforce or which involves the enforcement of the alleged arrangement or combination between the plaintiff corporation and other corporations, firms, and companies in relation to the sale of Akron pipe. As already suggested, the plaintiff, even if part of a combination illegal at common law, was not, for that reason, forbidden to sell property it acquired or held for sale. The purchases by the defendants had no necessary or direct connection with the alleged illegal combination; for the contracts be-

tween the defendants and the plaintiff could have been proven without any reference to the arrangement whereby the latter became an illegal combination. If, according to the principle of the common law, the Union Sewer Pipe Company could not have sold or passed title to any pipe it received and held for sale, because of an illegal arrangement previously made with other corporations, firms, or companies, a different question would be presented. But we are aware of no decision to the effect that a sale similar to that made by the present plaintiff to the defendants respectively would, in itself, be illegal or void under the principles of the common law. The contracts between the plaintiff and the respective defendants were, in every sense, collateral to the alleged agreement between the plaintiff and the other corporations, firms, or associations whereby an illegal combination was formed for the sale of sewer pipe.'

"Turning to the defense based on the anti-trust act of Congress, the court in the Connolly case said: 'Much of what has just been said in reference to the first special defense based on the common law is applicable to this part of the case. If the contract between the plaintiff corporation and the other named corporations, persons, and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations, or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold,—such property not being, at the time, if the course of transportation from one state to another or to a foreign country. *The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode*

prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies, and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid.' Further: 'Nor can the defendants refuse to pay for what they bought upon the ground that the 7th section of the Sherman act gives the right to any person "injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful" by the act, to sue and recover treble the damage sustained by him. We shall not now attempt to declare the full scope and meaning of that section of the act of Congress. It is sufficient to say that the action which it authorizes must be a direct one, and the damages claimed cannot be set off in these actions based upon special contracts for the sale of pipe that have no direct connection with the alleged arrangement or combination between the plaintiff and other corporations, firms, or companies. Such damages cannot be said, as matter of law, to have directly grown out of that arrangement or combination, and are, besides, unliquidated. Besides, it is well settled in Illinois that "unliquidated damages arising out of covenants, contracts, or torts disconnected with plaintiff's claim cannot be set off under the statute".'.

"We need not here refer to that part of the Connolly case relating to the defense based on the anti-trust act of Illinois; for the court adjudged that act

to be void because of a certain provision in it which, contrary to the Constitution of the United States, denied the equal protection of the laws to all persons within the jurisdiction of the state, except a named favored class.

"The present case is plainly distiguishable from the Connolly case. In that case the defendant, who sought to avoid payment for the goods purchased by him under contract, had no connection with the general business or operations of the alleged illegal corporation that sold the goods. He had nothing whatever to do with the formation of that corporation, and could not participate in the profits of its business. His contract was to take certain goods at an agreed price, nothing more, and was not in iteslf illegal, **nor part of nor in execution of any general plan or scheme that the law condemned.** *The contract of purchase was wholly collateral to and independent of the agreement under which the combination had been previously formed by others in Ohio. It was the case simply of a corporation that dealt with an entire stranger to its management and operations and sold goods that it owned to one who wished to buy them. In short, the defense in the Connolly case was that the plaintiff corporation, although owning the pipe in question and having authority to sell and pass title to the property, was precluded by reason* **alone** *of its illegal character from having a judgment against the purchaser. We held that that defense could not be sustained, either upon the principles of the common law or under the anti-trust act of Congress."* (Emphasis by court in boldface; italic emphasis supplied (29 S. Ct. 290, 291).)

The Court then turned its attention to the case before it and enunciated the principle of law which fits the case now at bar like the proverbial glove:

"The case now before us is an entirely different one. The Continental Wall Paper Company seeks,

in legal effect, the aid of the court to enforce a contract for the sale and purchase of goods which, **it is admitted by the demurrer, was in fact and was intended by the parties to be based upon agreements that were and are essential parts to an illegal scheme.** We state the matter in this way because the plaintiff, by its demurrer, admits, for the purposes of this case, the truth of all the facts alleged in the third defense. It is admitted by the demurrer to that defense that the account sued on has been made up **in execution of the agreements** that constituted or out of which came the illegal combination formed for the purpose and with effect of both restraining and monopolizing trade and commerce among the several states.

"*The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, to which both the plaintiff and the defendant were parties, and* **pursuant to which** *the accounts sued on were made out, and which had for their object, and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall Paper Company was organized. If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constitute the forbidden combination.* These considerations make it evident that the present case is different from the Connolly case. In that case the court regarded the record as presenting the question whether a voluntary purchaser of goods at stipulated prices, under a collateral, independent contract, can escape an obligation to pay for them upon the ground **merely** that the seller, which owned the goods, was an illegal combination or trust. We held that he could not, and nothing more touching that question was decided or intended to be decided in the

Connolly case.[3] *The question here is whether the plaintiff company can have judgment upon an account which, it is admitted by demurrer, was made up, within the knowledge of both seller and buyer, with direct reference to and in execution of certain agreements under which an illegal combination, represented by the seller, was organized. Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the states, and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends.* We hold that such a judgment cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which, as between man and man, he ought, perhaps, to pay, but for which he is unwilling to pay.

"In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties. It is of no consequence that the present defendant company had knowledge of the alleged illegal combination

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[3] Likewise, the *D. R. Wilder Mfg. Co.* case, *supra*, *Small Co.* case, *supra*, and *Bruce's Juices* case, *supra*, presented, in each instance, a situation where the defendant was not a party, but rather was a stranger to, the agreement which was violative in the cases of *Wilder* and *Small*, of the Sherman Anti-Trust Act of 1890 and in the case of *Bruce's Juices*, of the Robinson-Pattman Act (U. S. Code, Title 15, Section 13, 13a) and where the defendant was seeking to avoid payment merely because of the illegal character of the seller.

and its plans, or was directly or indirectly a party thereto. Its interest must be put out of view altogether when it is sought to have the assistance of the court in accomplishing ends forbidden by the law.

"In *Hanauer v. Doane*, 12 Wall. 342, 349, 20 L. ed. 439, 441, this court said: 'The whole doctrine of avoiding contracts for illegality and immorality is founded on public policy. It is certainly contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed, for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members.'

"In *McMullen v. Hoffman*, 174 U. S. 639, 654, 669, 43 L. ed. 1117, 1123, 1128, 19 Sup. Ct. Rep. 839, 845, 851, where the authorities are reviewed and the whole subject carefully examined, the court said: 'The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract,'—citing many English and American cases. 'The court refuses to enforce such a contract, and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as

that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law.' " (Emphasis by the Court in boldface; italic emphasis supplied (29 S. Ct. 291, 292).).

It is submitted that the following principles of law may be deduced from a reading of the five cases which represent the collective thinking of this Honorable Court in the area of law under discussion:

1. That where the seller and the purchaser enter into an agreement which is violative of the Sherman Anti-Trust Act, and the seller seeks to recover under the very contract which constitutes a violation of the Sherman Anti-Trust Act, the illegality "inheres" in the contract and the purchaser may successfully assert this illegality as a defense.

2. That where the seller and parties other than the purchaser enter into an agreement which is violative of the Sherman Anti-Trust Act and the seller subsequently enters into a separate and distinct contract of sale with the purchaser, the illegality arising from a violation of the Sherman Anti-Trust Act in the initial agreement is collateral to, and not inherent, in the contract of sale and the purchaser accordingly can not successfully urge, as a defense, the mere illegal character of the seller in a suit brought by the seller under the contract of sale.

While it is readily apparent to counsel for defendant that the distinction between the *Continental* case, *supra,* and the earlier *Connolly* case, *supra,* is that in the former the illegality "inhered" in the agreement upon which the seller sought to recover, whereas in the latter the illegality was collateral to the contract of sale upon which the seller sought to recover, the Circuit Court saw fit in its

Opinion of June 23, 1958 (see Page 8a of Appendix A) to explain the differences in the results reached by characterizing the alleged violations of the Sherman Anti-Trust Act as "vicious" in the *Continental* case, *supra*, and as "innocuous" in the *Connolly* case, *supra*. In this regard, it is submitted that neither the Sherman Anti-Trust Act of 1890 nor the judicial decisions interpreting same recognize that one type of violation of the Sherman Anti-Trust Act of 1890 is more heinous than another type of violation of the Sherman Anti-Trust Act of 1890, once a determination is made that a particular course of conduct constitutes a violation.[4]

When one comprehends the true distinction between the *Continental* case, *supra*, and the *Connolly* case, *supra*, and then indulges, as he must, upon a motion to strike, in the assumption that the averments of fact contained in the Affirmative Defenses and the Affirmative Allegations of the Amended Answer are verity, one is necessar-

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[4] Even if the test to determine whether a violation of the Sherman Anti-Trust Act of 1890 could be successfully urged as a defense in an action brought by the seller were to depend upon the relative seriousness of the violation, a standard of measurement which it is submitted would defy application, certainly, in view of the consistency with which this Court has condemned price fixing as being illegal *per se*, whether the prices fixed be reasonable or not (*United States v. Paramount Pictures*, 334 U. S. 131, 68 S. Ct. 915 (1948); *United States v. McKesson & Robbins, Inc.*, 351 U. S. 305, 76 S. Ct. 937 (1956); *United States v. New Wrinkle Inc.*, 342 U. S. 371, 72 S. Ct. 350 (1952); *United States v. Frankfort Distilleries*, 324 U. S. 293, 65 S. Ct. 661 (1945); *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 60 S. Ct. 811 (1940)), the price fixing agreement herein alleged would necessarily have to be regarded as a grave violation of the Sherman Anti-Trust Act of 1890. In this respect, it should be noted that the Circuit Court, in its Opinion of June 23, 1958 (see pages 10a, 11a of Appendix A) intimated, without actually deciding, that the so-called condition of non-delivery was not illegal, notwithstanding the fact that the condition of non-delivery was the means, and understandably so in view of the law of supply and demand, by which the parties sought to stabilize the price of onions and, if possible, to increase their price.

ily impelled to conclude that both the District Court and the Circuit Court erred in holding that the defendant had failed to allege a sufficient defense to the plaintiff's cause of action. The instant record presents a picture where the plaintiff is attempting to recover damages for the breach of the *very* agreement whose avowed purpose and object was to fix and manipulate the price of onions which constituted a part of Inter-state Commerce (App. 11a, 12a, 16a). In other words, in contrast to the situation in the *Connolly* case, *supra,* the plaintiff herein, in order to prove his case, must ask and did ask the District Court to enforce the payment of the price of onions in pursuance of a contract which was intended by the parties to be and which was, in fact, an agreement to fix prices. This is not a situation where the plaintiff and Sam Siegel agreed, conspired and combined to restrain trade in Inter-state Commerce with X, Y, Z, etc., and subsequently the defendant, in a separate, independent and collateral agreement, purchased onions from one of the parties to the illegal combination and conspiracy, the factual situation existing in the *Connolly* case, *supra,* and in two of its three offsprings.[5]

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[5] In the case of *Bruce's Juices, supra,* the plaintiff allegedly was in violation of the Robinson-Pattman Act, but, as was true in the *Connolly* case, *supra,* the *Wilder* case, *supra,* and the *Small* case, *supra,* the defendant was a stranger, rather than a party, to the alleged violation and thus he could not successfully urge the violation as a defense. A reading of the Circuit Court's Opinion of June 23, 1958 (see Page 8a of Appendix A) very clearly indicates that its ultimate decision was somewhat dictated by the fact that it considered it to be an incongruous result to allow a party in *pari delicto* to avoid payment, whereas a stranger, innocent of any wrong-doing, would not be allowed to successfully urge a violation of the Sherman Anti-Trust Act of 1890 as a defense. The fallaciousness of the Circuit Court's reasoning in this respect is obvious. Whenever the illegality "inheres" in the contract,

(Continued on next page)

This is, the record clearly reveals, a situation where, *aliunde* the agreement, an integral portion of which the plaintiff seeks to enforce, there is no pre-existing agreement, combination, or conspiracy in restraint of trade in interstate commerce. The defendant and other onion growers, having been informed by the plaintiff and Sam Siegel that the latter would flood the onion market and thus depress the price unless the former agreed to purchase a portion of 600 carloads of onions owned, held or controlled by the plaintiff and Sam Siegel (App. 14a, 15a; Paragraph 1 of Affirmative Defenses) and facing the unhappy alternative of either purchasing a portion of said onions or suffering a severe pecuniary loss, (App. 15a; Paragraph 1 of Affirmative Defenses), became unwilling parties to an agreement and members of a combination and conspiracy to fix and manipulate the price of onions which constituted a part of interstate commerce (App. 11a; Paragraph 3 of Amended Answer; App. 15a, 16a; Paragraphs 4, 5, 7, and 8 of Affirmative Defenses). This combination and conspiracy literally arose by virtue of the agreement by the terms of which the defendant and

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(Continued from preceding page)

the aid of the Court is denied, in the language of this Honorable Court, at 29 S. Ct. 292 "not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties". Public policy considerations require that the courts allow those who are in *pari delicto* to remain in a *status quo* in order to deter future wrong-doers from entering into illegal contracts, but this consideration does not come into play in situations comparable to that found in the *Connolly* case, *supra*, for in the *Connolly* case, *supra*, while the Court undoubtedly would have refused to enforce the agreement which constituted a violation of the Sherman Anti-Trust Act of 1890, it refused to deny its assistance to the plaintiff in enforcing a separate and distinct contract of sale with the defendant. The Court, in essence, held that the plaintiff was not "an outlaw", to which the doors of the halls of justice would be forever closed, merely because of the fact that it had previously entered into an agreement in violation of the Sherman Anti-Trust Act of 1890.

the other onion growers made promises to purchase 287 carloads of onions and to refrain from selling these onions upon the futures market during the 1955-56 trading season, in return for which the *quid pro quo* to be received by them from the plaintiff and Sam Siegel, in addition to the promise of the latter men to deliver the onions, was their promise to forbear from selling any other onions owned, held or controlled by them during the balance of the trading season upon the futures market, the avowed and express object and purpose of the agreement being to create a fictitious market condition in onions, to fix the price at the then prevailing price or, if possible to increase the price (App. 11a, 12a; Paragraph 3 of Amended Answer; App. 15a, 16a; Paragraphs 3, 4, 5, 7 and 8 of Affirmative Defenses).

In view of the terms of this agreement and in view of the fact that the sale of the fifty (50) carloads of onions to the defendant was in pursuance of the agreement and was an essential part thereof, this Honorable Court's decision in the *Continental* case, *supra,* would certainly sustain the premise of defendant that a legally sufficient defense, invulnerable to attack by a Motion to Strike, was alleged and that the District Court erred in striking the Affirmative Defense predicated upon an alleged violation of the Sherman Anti-Trust Act.

In an apparent effort to avoid the inevitable consequences of applying the holding of this Honorable Court in the *Continental* case, *supra,* to the facts before it, the Circuit Court attributed to the word "inhere" a different meaning than that placed upon the term by this Honorable Court in the *Continental* case, *supra.* The Circuit Court, by ignoring the true purpose of the overall agreement between the plaintiff and Sam Siegel, on the one hand, and the defendant and the other onion growers, on

the other hand, sought to segregate and isolate the so-called condition of non-delivery from the other terms and conditions of the agreement and then concluded that the defendant's promise to pay for the fifty (50) carloads of onions was supported by the lawful consideration of the plaintiff's promise to deliver said onions (see Page 11a of Appendix A). The Circuit Court took the position that since the plaintiff was not seeking to enforce the mutual promises to refrain from delivering onions during the balance of the trading season upon the futures market, the illegality, if any, in these mutual promises was collateral to, rather than inherent in, the promise of the defendant to pay for the fifty (50) carloads of onions (see Page 11a of Appendix A) and that, accordingly, the defendant would not be allowed to import into the promise to pay the illegality, if any, embodied in the mutual promise to refrain from delivering onions for the balance of the trading season upon the futures market (see Page 11a, Appendix A). It is quite obvious that the conclusion reached by the Circuit Court herein is not supported by the decision of this Honorable Court in the *Continental* case, *supra*, for it is most important to observe that in the *Continental* case, *supra*, this Court held that the actual receipt (not merely, as herein, an unexecuted promise of the plaintiff to deliver) of the merchandise by the defendant was not a sufficient legal consideration upon which the duty of the defendant to pay could be enforced, since the rendering of a judgment for the plaintiff would be tantamount to affording him the aid of the judiciary in enforcing an agreement which is in direct violation of the Sherman Anti-Trust Act of 1890.

The Circuit Court primarily bottomed its conclusion that the assumed illegal condition or covenant, to-wit, that of non-delivery, could be separated from the lawful promise

for a lawful consideration upon the case of *Cincinnati, Portsmouth, Big Sandy, and Pomeroy Packet Co. v. Bay*, 200 U.S. 179, 26 S.Ct. 208 (1906), but the *Cincinnati* case, *supra*, unlike the *Continental* case, *supra*, is readily distinguishable from the case at bar in that in the former case, this Court, which was, at the outset, dubious as to whether the purchaser's agreement to maintain rates even pertained to Interstate Commerce, noted that said agreement to maintain rates was not alleged to have entered into the consideration of the sale, whereas here the promise of the defendant and the other onion growers to purchase the 287 carloads of onions was expressly alleged to be in consideration of the promise of plaintiff and of Sam Siegel not to deliver any of the onions owned, held or controlled by them upon the futures market for the balance of the 1955-1956 trading season (App. 11a, 12a, 15a).

PRAYER

WHEREFORE, it is respectfully submitted that this petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

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APPENDIX A

IN THE

United States Court of Appeals for the Seventh Circuit

No. 12190 SEPTEMBER TERM, 1957, APRIL SESSION, 1958

VINCENT W. KASUGA,
Plaintiff-Appellee,
v.
JACK H. KELLY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 23, 1958

Before MAJOR, SCHNACKENBERG and PARKINSON, *Circuit Judges.*

MAJOR, *Circuit Judge.* This is an appeal from a summary judgment in favor of appellee (plaintiff) against appellant (defendant), entered October 11, 1957, in the amount of $37,342.80, with interest and costs. The action

was commenced September 11, 1956, and the judgment represents the balance due on a sale made December 17, 1955, by plaintiff to defendant, of fifty cars of onions.

If plaintiff was entitled to recover, there is no dispute as to the amount due as embodied in the judgment. The issues raised on this appeal require a statement of the salient facts which give rise thereto, as well as the essential proceedings in the District Court. The case was tried and decided upon the pleadings, which included plaintiff's complaint, defendant's answer thereto, certain affirmative defenses asserted by defendant, as well as a counterclaim by which defendant sought to recover damages against plaintiff in the amount of $75,000. There was submitted in connection with the counterclaim an affidavit by each of the parties.

On December 17, 1955, when the contract in dispute was made, plaintiff and his associate, Sam Siegel (the latter not a party to this action), were owners of actual onions in Chicago and elsewhere. Defendant was a grower of onions. Both parties were engaged in the marketing of onions in Illinois and in commerce generally throughout the country. By the terms of the contract plaintiff agreed to sell and defendant agreed to purchase fifty cars of onions at $960.00 per car, plus storage charges, or a total of $48,000, plus storage charges. The terms of sale were: initial cash payment, $300.00 per car, or $15,000; second payment to be made by January 10, 1956, of $200.00 per car, or $10,000; the balance of $460.00 per car, plus storage to be computed at the time defendant ordered the cars withdrawn from storage, or a total of $28,082.00. From time to time, defendant withdrew from storage, thirteen cars of onions. The payments made by defendant consisted of $7,500 on December 22, 1955, and $5,000 on January 18, 1956, or a total payment of $12,500. No further

payments were made as provided for in the agreement or for the thirteen cars of onions withdrawn by defendant from storage.

Onions, due to their perishable nature, can be kept in storage only for a reasonable period. On February 16, 1956, plaintiff sent a telegram to defendant, as follows:

> "Storage onions you purchased from me on 12-17-55 now showing deterioration. You agreed to order out of Chicago storage and pay for these onions during January and early February 1956. Present condition of onions require immediate action. Demand payment by 2-20-56 and will surrender negotiables upon receipt of payment."

On the same date, plaintiff wrote defendant, which in general was confirmatory of the telegram. On February 20, 1956, defendant responded by telegram, as follows:

> "Our agreement does not provide that onions be withdrawn from storage in substantial quantity by early February. We intend to abide by the original agreement and we expect you to do likewise."

Defendant, on March 9, 1956, notified plaintiff that he would withdraw no further onions from storage and that he would make no further payments. The reasons for such refusal will be subsequently noted under defendant's affirmative defenses.

The facts so far stated are conceded by defendant. In connection therewith it is pertinent to note that defendant makes no contention, either by allegation or otherwise, but that the price which he agreed to pay for the onions was the fair and reasonable cash market price. For reasons asserted in the affirmative defenses, defendant contends that payment of the balance due on the contract cannot be judicially enforced. Such defenses are predi-

cated upon an alleged factual situation from which it is argued that there was incorporated in and made a part of the sale agreement certain conditions in violation of anti-trust laws, both Federal and State (Illinois), as well as the Commodity Exchange Act. These affirmative defenses were, on motion of plaintiff, stricken by the court. We need cite no authority for the well established rule that all facts well pleaded must be taken as true. This is so even though plaintiff by answer has in large part denied defendant's allegations.

We find it difficult, as is often the case under similar circumstances, to separate facts well pleaded from those of a conclusory and argumentative nature. It appears, however, that the essential allegation of fact is that referred to as the non-delivery provision asserted to have been made at the same time and in connection with the sale of the onions. It appears from the briefs that each of the parties recognizes this provision as furnishing the principal bone of contention. Relative thereto, it is stated in defendant's brief that it was agreed by the parties that "the plaintiff and Sam Siegel would not deliver any onions on the futures market for the balance of the 1955-1956 trading season" (referring to onions owned and controlled by plaintiff and Siegel other than those involved in the sale to defendant), and that the defendant and other onion growers "agreed to purchase the 287 carloads of onions [this includes the 50 cars purchased by defendant] and to desist from selling them upon the futures market for the balance of the trading season in consideration of the promise of the plaintiff and Sam Siegel not to deliver any of the onions owned, held or controlled by them on the futures market for the balance of the 1955-1956 trading season."

It is alleged as a legal conclusion, "The avowed and express object of said agreement was to fix the price of

onions and limit the amount of onions sold in the State of Illinois, to fix and manipulate the market price of onions and to stabilize said price and, if possible, to increase their price, said onions being a part of interstate commerce, and to create a false and fictitious market condition." In connection with this non-delivery provision, it is pertinent to note that each of the parties remained free to merchandise onions in normal commercial trade channels.

The District Court in a memorandum opinion reasoned that the Sherman Anti-Trust Act could not be asserted as a defense to the action for the unpaid balance of the purchase price, principally upon three grounds: (a) the so-called condition of non-delivery was not an inherent part of the sale and, thus, assuming the reciprocal agreement not to sell onions on the futures market during the balance of the 1955-1956 trading season was illegal, the obligation of defendant to pay was supported by other lawful consideration, to-wit, plaintiff's promise to sell the fifty carloads of onions at an agreed price; (b) the remedies provided by the Sherman Anti-Trust Act are exclusive and do not afford defendant the affirmative defense asserted, and (c) the so-called condition of non-delivery was not an illegal restraint of trade condemned by the Sherman Act.

In support of his position, plaintiff places great reliance upon *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, while defendant places equal reliance upon *Continental Wall Paper Company v. Louis Voight and Sons Company*, 212 U. S. 227. *Connolly* involved an action to recover the price of sewer pipe sold and delivered to defendant. The defense asserted that plaintiff was part of a monopolistic conspiracy and combine for the express purpose of limiting production of sewer pipe and increas-

ing the market price thereof, that the sale involved was at prices fixed by the monopoly in violation of the Sherman Act and, therefore unenforceable. The Court, in holding the defense not available, stated (page 551):

> "The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies, and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid."

Continental involved an action to recover the alleged balance on an account for merchandise sold and actually delivered. Defendant as one of its defenses asserted that it, along with plaintiff and other corporations, was a party to an agreement, combination and conspiracy in restraint of trade in violation of the Sherman Anti-Trust Act and that the contract of sale was an inherent part of the illegal scheme. The Court sustained the validity of the defense, with a dissenting opinion by four members. The Court at great length distinguished the *Connolly* case, and discussed the situation before it as a basis for a holding contrary to that of *Connolly*, concluding such discussion as follows (page 260):

> "In short, the defense in the *Connolly* Case was that the plaintiff corporation, although owning the pipe in question and having authority to sell and pass title to the property, was precluded by reason *alone* of its illegal character from having a judgment against the purchaser. We held that that defense could not be sustained either upon the principles of the common law or under the Anti-Trust Act of Congress."

In *Continental,* both plaintiff and defendant were admittedly members of a combination and conspiracy in violation of the Anti-Trust Act. The Court emphasizes the particularly vicious nature of the violations in which the parties were engaged. As descriptive thereof the Court quotes from the Court of Appeals as follows (page 256):

> "'The conspiring mills were situated in many States. The consumers [of wall paper] embraced the whole citizenship of the United States. The jobbers and wholesalers, who were to be coerced into contracts to buy their entire demands from the Continental Wall Paper Company or be driven out of business, were in every State. Before the combination each of the combining companies was engaged in both state and interstate commerce. The freedom of each, with respect to prices and terms, was restrained by the agreement and interstate commerce directly affected thereby, as well as by the enhancement of prices which resulted. A more complete monopoly in an article of universal use has probably never been brought about. It may be that the wit of man may yet devise a more complete scheme to accomplish the stifling of competition. But none of the shifts resorted to for suppressing freedom of commerce and securing undue prices, shown by the reported cases, is half so complete in its details. None of the schemes with which this may be compared is more certain in results, more widespread in its operation, and more evil in its purposes.'"

After all is said and done, the essential distinction between *Connolly* and *Continental* is that in the former plaintiff was engaged in a rather innocuous form of violation of the anti-trust laws to which defendant, as buyer, was not a party, while in *Continental* plaintiff was engaged in a vicious form of anti-trust violation and defendant, as buyer, was a party to plaintiff's unlawful activities. It is also important that in *Connolly* recovery was sought for the fair and reasonable price of goods sold, while in *Continental* recovery was sought for the price which resulted from any was determined by the terms of the conspiracy in which the parties were participants. In the former, defendant was not permitted to plead plaintiff's anti-trust violation as a defense, while in the latter the same defense asserted by defendant was sustained. Thus, these two cases, as defendant would have them applied, lead to the incongruous result that a Court will lend its aid to enforce payment by a buyer innocent of wrongdoing but will deny its aid to enforce payment by a buyer who is a wrongdoer, that is, a party to and a part of a combination engaged in anti-trust violations. A reading of the cases subsequent to *Continental* demonstrates that the Courts generally, while recognizing its rationale, have in the main limited the case to its particular vicious facts. Its application has been denied under a variety of circumstances.

In *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U. S. 165, the Court rejected the defense of alleged violation of the Anti-Trust Acts. In doing so, we think it enlarged the doctrine of *Connolly* and at the same time limited that of *Continental*. The action was brought to recover the price of glucose sold to defendant. In defense it was claimed that plaintiff was part of a monopoly which had advanced the price of glucose and set up a profit-shar-

ing plan under which purchasers were required to buy all of their requirements from the combine, thus restraining competition in violation of the Sherman Act. The contract of sale permitted the purchaser to share in a profit-sharing plan of the seller, on condition that the purchaser use the seller's glucose exclusively. It was specifically provided in the contract for sale, "Goods herein sold are for your own consumption and not for resale." Thus, defendant (buyer) was by agreement with plaintiff (seller) restricted in its right to purchase as well as in the use of the purchased product.

The Court affirmed the action of the lower Court in striking the answer as being no defense, affirmed judgment for the price of the goods sold, and stated (page 172):

> "* * * the sale and the obligations which arose from it depended upon a distinct contract with reciprocal considerations moving between the parties,—the receipt of the goods on the one hand and the payment of the price on the other. And this is but a form of stating the elementary proposition that courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so or some remote aid to the accomplishment of a wrong which might possibly result—doctrines of such universal acceptance that no citation of authority is needed to demonstrate their existence, especially in view of the express ruling in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679, 22 Sup. Ct. Rep. 431, applying them to the identical general question here involved."

The Court continued (page 172):

> "The case therefore reduces itself to the question whether the contract of sale was inherently illegal so as to bring it within the also elementary rule that courts will not exert their powers to enforce illegal

> contracts or to compel wrongdoing. The only suggestion as to the intrinsic illegality of the sale results from the averments of the answer as to the offer of a percentage of profits upon the condition of dealing exclusively with the Refining Company for the following year and the clause to the effect that the goods were bought by the Manufacturing Company for its own use and not for resale. But we can see no ground whatever for holding that the contract of sale was illegal because of these conditions."

In *Wilder,* the *Continental* case was relied upon in support of the defense, as it is here. Relative thereto, the Court stated (page 177):

> "But it is apparent on the face of the opinion in the *Continental Wall Paper* Case that it affords no ground for the extreme and contradictory conclusion thus deduced from it since the ruling in that case was based not upon any supposed right to import into a legal and valid contract elements of wrong which there was no right to consider, but was rested exclusively upon elements of illegality inhering in the particular contract of sale in that case which elements of illegality may be thus summarized: (a) the relations of the contracting parties to the goods sold, (b) the want of real ownership in the seller, (c) the peculiar obligations which were imposed upon the buyer, and (d) the fact that to allow the nominal seller to enforce the payment of the price would have been in and of itself directly to sanction and give effect to a violation of the Anti-Trust Act inhering in the sale."

It seems to us that the reasoning of the Court in *Wilder,* and particularly the appraisement which it made of its former opinion in *Continental,* is highly pertinent to the instant situation. Here, as in *Wilder,* there was a contract of sale. Plaintiff was to receive and defendant was to pay the fair market value of the onions. *Assuming that which*

we think doubtful, that is, that the non-delivery agreement was illegal, there is no more reason here than there was in *Wilder* for importing such elements of wrong into an otherwise legal and valid contract. More than that, the instant action is not to enforce the non-delivery provision but to enforce defendant's promise to pay. Such enforcement, as stated in *Wilder* (page 177), will not "sanction and give effect to a violation of the Anti-Trust Act inhering in the sale." This principle has been reaffirmed in *Bruce's Juices, Inc. v. American Can Co.,* 330 U. S. 743. In that case it was stated (page 755) that the Court would entertain a defense that the contract is illegal only where the suit "has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought * * *." See also *United States Hoffman Machinery Corp. v. Valeteria Cleaners, Inc.,* 143 F. Supp. 797, 799.

Defendant challenges and seeks to disinguish the cases which we have discussed by arguing that the non-delivery provision of the contract was an integral part thereof, in other words, that because of such provision the entire contract is tainted with illegality and no part of it is enforceable. We do not agree with the premise upon which this contention rests. The non-delivery provision, while a part of the same contract, is separable from and not inherent in defendant's promise to pay the reasonable market price for the onions. A case in point is *Cincinnati, Portsmouth, Big Sandy & Pomery Packet Co. v. Bay,* 200 U. S. 179. In that case, the Court separated the legal from the illegal covenant and enforced the lawful promise made for adequate consideration even though an unlawful promise was made at the same time for the same consideration. In reference to one facet of the unlawful portion of the contract which appears to have been a price fixing condition, the Court stated (page 185):

> "It only remains to say a word as to the agreement to maintain rates. This is a covenant by the purchaser, the plaintiff in error. It is not the covenant sued upon. It is not declared to enter into the consideration of the sale. If necessary, we should be astute to avoid allowing a party to escape from his just and substantially legal undertaking on such ground."

Defendant also relies upon the Commodity Exchange Act (7. U. S. C. Par. 5, 13). It is contended that the contract in suit is in violation of that Act on the basis that the non-delivery provision created a "false and fictitious" market condition in onions by manipulation and increase in price. The contention with reference to this Act parallels that relative to the Federal Anti-Trust Act. Our discussion in connection with that Act is equally pertinent. In our judgment, and we so hold, the affirmative defenses predicated upon the Federal Anti-Trust Act and the Commodity Exchange Act are not available to defendant and such defenses were properly stricken by the District Court.

Defendant as a further affirmative defense also relies upon the Anti-Trust Act of Illinois (Chap. 38, Sec. 569, *et seq.*, Smith-Hurd Illinois Ann. Stat.). Section 573 declares that any contract or agreement in violation thereof shall be absolutely void. Section 574 provides that a purchaser of a commodity contrary to the provisions of the Act may plead the Act as a defense to any suit for the recovery of such price. Thus, the Illinois Act, unlike the Federal Act, specifically provides that a violation of the Act may be pleaded as a defense. The Illinois Act as the substantive law of the State is applicable only to intrastate commerce. Defendant apparently so recognizes and argues that such commerce was involved inasmuch as the contract of sale was made and was to be performed in the State of Illinois. Defendant makes this argument in spite of the

frequent allegations in his pleadings that "said onions which were the subject of said agreement and contract were a part of interstate commerce." In 15 C. J. S. Sec. 133 (b), it is stated that "state anti-trust laws do not apply to transaction involving interstate, * * *." It is hardly open to doubt but that the transaction in issue involved interstate commerce. It is, therefore, our view that the Illinois Act is without application.

Furthermore, the Illinois provision which makes a violation available as a defense has been narrowly construed by this Court. *Chicago Wall Paper Mills v. General Paper Co.*, 147 Fed. 491. We held that the defense could not be raised in an action for the recovery of the purchase price of goods where it was not sought to enforce the illegal condition. We reasoned that the illegal covenant should, where possible, be separated from the valid promise to pay for the goods sold. As already shown, the Federal Courts have permitted recovery based upon the same reasoning.

We may add that a reading of the Illniois cases is convincing that the transaction in dispute is not violative of the Illinois Act, even though its applicability be assumed. In *Match Corp. of America v. Acme Match Corp.*, 285 Ill. App. 197, 204, the Court stated:

> "All contracts which on their face place a restriction upon the acts of the other party to the contract are necessarily a restraint to a certain extent. If the effect does not destroy competition and is merely intended to increase the business of the parties to the contract, and is only incidental to and found necessary in order to protect the parties' interest as set forth in the contract and does not tend to promote a monopoly, such provisions do not make the contract illegal and void."

See also *Moody & Waters Co. v. Case-Moody Pie Corp., et al.*, 354 Ill. 82, and *Southern Fire Brick and Clay Co. v. Garden City Sand Co., et al.*, 223 Ill. 616.

Lastly, defendant contends that its counterclaim was improperly dismissed. In this claim it was alleged that plaintiff violated the non-delivery provision of the contract by delivering onions on the futures market during the balance of the 1955-1956 trading season and that plaintiff disrupted the cash market of onions by selling and delivering unusual quantities below the prevailing price. The counterclaim does not alleged when this alleged breach on the part of plaintiff took place. Plaintiff in support of his denial of a breach submitted an affidavit which accounted for the fifty carloads contracted for by defendant. The affidavit shows that on or about February 7, 1956, thirteen carloads were withdrawn from storage by defendant; March 19, 1956, fourteen carloads were sold by plaintiff to Campbell Soup Company, and at a later date eight carloads were sold for cash to other onion brokers, leaving in storage fifteen carloads which had deteriorated to the extent that they could not be sold and were abandoned. Neither the manner of disposal of these onions by plaintiff nor the time is disputed by defendant.

The short and fatal answer to defendant's contention is that he first breached the contract. As heretofore shown, defendant agreed to an initital cash payment of $15,000, and a second payment of $10,000 by January 10, 1956. However, the total payment made by him was $12,500. Thus, defendant was in continuous default and breach of the contract from and after January 10, 1956. It is a well established principle that a party to a contract who commits the first breach of its terms cannot maintain an action for a subsequent breach by the other party. *Realty Acceptance Corp. v. Montgomery,* 51 F. 2d 636, 640; *Raybestos-Manhattan, Inc. v. Asbestos Textile Co., et al.,* 79 F. 2d 634, 637; *Sonken-Galamba Corp. et al. v. Butler Iron & Steel Co.,* 119 F. 2d 283, 286. Moreover, it must be remembered that

on March 9, 1956, defendant notified plaintiff that he would withdraw no further onions from storage and that he would make no further payments. At that time plaintiff was charged with the obligation of disposing of the onions at the best price available in mitigation of damages sustained by reason of defendant's breach. There is no allegation in the pleadings or affidavits that plaintiff acted improperly in the discharge of this obligation. In fact, as noted, plaintiff's affidavit, which is not denied, demonstrates that the onions (other than the thirteen cars for which delivery was accepted by defendant) were disposed of by plaintiff subsequent to the time when defendant refused to accept further delivery, and that defendant was given credit for the amount so realized. In our view, defendant's counterclaim failed to state an action upon which he was entitled to relief, and the claim, together with the answer thereto and affidavits submitted by the parties, demonstrates that there was no material issue of fact raised or involved.

In our judgment and we so hold, the District Court committed no error in striking the affirmative defenses pleaded by defendant or in dismissing his counterclaim. The judgment appealed from is AFFIRMED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 267

JACK H. KELLY,
Petitioner,
vs.
VINCENT W. KOSUGA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLANT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 257 F. 2d 48 (1958).

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit, review of which is herein sought, was entered on the 23rd day of June, 1958. Within the ninety day period prescribed by Section 2101(c) of Title 28 U. S. C. A., the appellant filed his Petition for Writ of Certiorari with this Honorable Court on August 11, 1958. Said writ was granted on October 13, 1958.

STATUTORY PROVISIONS INVOLVED

Section 1, Title 15 of the United States Code (1940 Edition) provides at pages 1013 and 1014 of Volume I, in pertinent portions:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy declared by section 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court * * *."

QUESTION PRESENTED FOR REVIEW

Whether the District Court of the United States for the Northern District of Illinois, Eastern Division, and the United States Court of Appeals for the Seventh Circuit erred in holding that the appellant's affirmative defense, alleging a violation of the Sherman Anti-Trust Act of 1890, was insufficient, within the meaning of Rule 12(f)

of the Federal Rules of Civil Procedure and thus properly stricken, where the appellee and the appellant were both parties to an agreement whose purpose was to fix prices with respect to a commodity which was a part of interstate commerce and where the appellee was seeking to invoke the aid of the Federal District Court to enforce the very agreement which constituted, in itself, a violation of the Sherman Anti-Trust Act of 1890.

STATEMENT OF THE CASE

(Unless otherwise clearly shown by the context, figures in parentheses refer to corresponding pages of Transcript of Record)

The appellee, hereinafter referred to as plaintiff, commenced action against the appellant, hereinafter referred to as defendant, in the United States District Court for the Northern District of Illinois, Eastern Division, hereinafter referred to as District Court, on September 11, 1956. The suit, predicated upon diversity of citizenship (United States Code, Title 28, Section 1332), was brought to recover the sum of $37,342.80, which allegedly represented the unpaid balance of the purchase price of fifty (50) carloads of onions sold by the plaintiff to the defendant at the unit price of $960.00 per car, plus storage charges (R. 3-10). On March 22, 1957 the defendant filed an Amended Answer, which set up, *inter alia,* certain Affirmative Defenses and also a Counterclaim (R. 10-18). Plaintiff then filed a Motion to Strike the Affirmative Defenses in addition to a Reply to the Amended Answer (R. 18-21).

The District Court, in pursuance of its Memorandum Opinion of April 24, 1957 (R. 22-26), granted the Motion to Strike Affirmative Defenses (R. 26) and subsequently, on August 15, 1957, denied defendant's Motion for Reconsideration (R. 27-33) and reaffirmed its ruling striking

the Affirmative Defenses (R. 33). A Motion for Summary Judgment, filed by plaintiff on August 22, 1957 (R. 34-37), and opposed by the defendant (R. 37-39), was granted on October 11, 1957 (R. 44-45). Judgment in the amount of $37,342.80 with interest and costs, was entered on the Complaint in favor of the plaintiff and against the defendant, whereas the defendant's Counterclaim was dismissed (R. 44, 45).

The plaintiff alleged (R. 3; Paragraph 3 of Complaint) and the defendant admitted (R. 11; Paragraph 3 of Amended Answer) that on December 17, 1955, the plaintiff sold to the defendant fifty (50) carloads of United States No. 1 grade yellow globe onions in Chicago storage at $960.00 per car, plus storage charges incurred after the sale. The plaintiff alleged (R. 3, 4; Paragraph 4 of Complaint) and the defendant admitted (R. 11; Paragraph 4 of Amended Answer) that only the sum of $12,500.00 was paid on the account. The plaintiff sued for the unpaid balance, plus storage charges, minus the sum realized upon the sale of the thirty-seven (37) cars of onions which had not been withdrawn from storage by the defendant, the total amount sought being $37,342.80 (R. 4, 5; Paragraphs 5, 6, 7, 8 and 9 of Complaint.)

The defendant, in his Affirmative Defenses (R. 13-15; Paragraph 1 through 8 of Affirmative Defenses) and in certain other affirmative allegations contained in the Amended Answer (R. 11, 12; Paragraphs 3 and 4 of Amended Answer) assumed the legal position that the contract of sale was illegal and that, accordingly, the plaintiff, being *in pari delicto* with the defendant, could not invoke the assistance of the Court to recover the unpaid portion of the purchase price, plus storage charges (R. 15; Paragraph 9 of Affirmative Defenses). Succinctly stated, the following allegations of fact were embodied in the Affir-

mative Defenses and in other affirmative allegations contained in the Amended Answer:

The plaintiff and his associate Sam Siegel, who possessed or controlled some one thousand (1000) cars of onions in cold storage in the area of Chicago, Illinois, and in storage in the country, informed the defendant and other onion growers during the months of November and December, 1955, that unless the defendant and the other onion growers purchased a large portion of the onions owned by the plaintiff, the plaintiff and Sam Siegel would deliver large quantities of onions on the futures exchange for the purpose of depressing both the futures and cash market price of onions (R. 13, 14; Paragraph 1 of Affirmative Defenses). The defendant and the other onion growers, fearful of the economic consequences which might befall them in the event the onion market were to be flooded, entered into an agreement with the plaintiff and Sam Siegel to purchase from them two hundred and eighty-seven (287) carloads of onions, of which the defendant's share was fifty (50) carloads (R. 14, 15, 11; Paragraphs 1 and 4 of Affirmative Defenses, Paragraph 3 of Amended Answer.) In consideration for the promises of the defendant and of the other onion growers to purchase the two hundred and eighty-seven (287) carloads of onions from the plaintiff and Sam Siegel and to refrain from selling said onions upon the futures market for the balance of the 1955-1956 trading season, the plaintiff and Sam Siegel promised and agreed that they likewise would forbear from selling any onions owned, held or controlled by them upon the futures market for the balance of the trading season (R. 14, 11; Paragraph 3 of Affirmative Defenses; Paragraph 3 of Amended Answer), with it being the express and avowed purpose and object of the agreement, combination, and conspiracy to fix the price and

limit the amount of onions to be sold in the State of Illinois (R. 15; Paragraph 6 of Affirmative Defenses), to create "a false and fictitious market condition" (R. 11; Paragraph 3 of Amended Answer), and to fix and manipulate the market price of onions and to stabilize said price and, if possible, increase said price (R. 15; Paragraphs 5 and 8 of Affirmative Defenses), said onions being a part of interstate commerce (R. 15; Paragraphs 7 and 8 of Affirmative Defenses).

Appeal to the United States Court of Appeals for the Seventh Circuit, hereinafter referred to as Circuit Court, was taken on October 22, 1957 from the District Court's rulings striking the Affirmative Defenses from the Amended Answer and granting the Motion for Summary Judgment with respect to both the Complaint and the Counterclaim (R. 45). The Opinion and Judgment of the Circuit Court, affirming the decision of the District Court, was filed on June 23, 1958, the Opinion being reported at 257 F. 2d 48 (1958) (R. 46-59). A Petition for Writ of Certiorari was filed with this Honorable Court on August 11, 1958, and said Petition was granted on October 13, 1958 (R. 60).

SUMMARY OF ARGUMENT

Upon a Motion to Strike Affirmative Defenses and other affirmative allegations contained in an Amended Answer, all facts which are well pled by the defendant must be deemed to be true for the purpose of determining whether an "insufficient" defense, within the meaning of Rule 12(f) of the Federal Rules of Civil Procedure, has been alleged.

All of the pertinent cases decided by this Honorable Court, particularly the case of *Continental Wall Paper*

Co. v. Louis Voight and Sons Co., 212 U. S. 227, 29 S. Ct. 280 (1908), have recognized the principle that where the seller and the purchaser of an article or merchandise in interstate commerce enter into a contract to sell and purchase which is violative of the Sherman Anti-Trust Act of 1890, and the seller seeks to recover under the very contract to sell and purchase which constitutes a violation of the Sherman Anti-Trust Act of 1890, the purchaser may successfully urge the violation of the Sherman Anti-Trust Act of 1890 as an affirmative defense, as under these circumstances, the illegality inheres in, rather than being collateral to, the contract to sell and purchase. The rule of law is admittedly different when the seller of an article or merchandise in interstate commerce and parties other than the purchaser enter into an agreement which is violative of the Sherman Anti-Trust Act of 1890, and the seller subsequently enters into a separate and distinct contract to sell and purchase with the purchaser. In such a situation, if the seller sues upon the contract to sell and purchase, the purchaser cannot successfully urge, as a defense, the mere illegal character of the seller, as, under such circumstances, the illegality involved in the original agreement which is violative of the Sherman Anti-Trust Act of 1890 is collateral to the independent and subsequent contract to sell and purchase upon which suit is brought by the seller against the purchaser.

The averments contained in the Affirmative Defense and in certain affirmative allegations in the Amended Answer set forth facts which patently indicate that the plaintiff and the defendant herein entered into a contract to sell and purchase onions in interstate commerce, with the express purpose of said agreement being to fix the price of onions. This agreement was in direct violation of the Sherman Anti-Trust Act of 1890 and thus the Dis-

trict Court erred in striking the defense alleging this violation of the Sherman Anti-Trust Act of 1890.

Public policy considerations require that the courts allow those who are *in pari delicto* to remain in a *status quo* in order to deter future wrongdoers from entering into illegal contracts. Hence, the defense of illegality is given judicial sanction, not for the benefit of the defendant, but because public policy demands that the courts should not lend judicial aid to parties to illegal contracts.

ARGUMENT

WHERE THE PLAINTIFF AND THE DEFENDANT ARE BOTH PARTIES TO AN AGREEMENT, COMBINATION, AND CONSPIRACY TO FIX PRICES WITH RESPECT TO A COMMODITY WHICH IS A PART OF INTERSTATE COMMERCE AND WHERE A CONTRACT OF SALE WAS INTENDED BY SAID PARTIES TO BE AND WAS, IN FACT, AN INTEGRAL PART OF THE ILLEGAL SCHEME, THE DEFENDANT, AS THE PURCHASER, MAY ASSERT THE DEFENSE OF ILLEGALITY, PREDICATED UPON THE SHERMAN ANTI-TRUST ACT OF 1890, TO THE ACTION OF THE PLAINTIFF, AS THE SELLER, TO RECOVER DAMAGES RESULTING FROM THE DEFENDANT'S REFUSAL TO TAKE DELIVERY OF THIRTY-SEVEN (37) CARLOADS OF ONIONS AND TO PAY THE OUTSTANDING BALANCE UPON THE PURCHASE PRICE

The District Court, upon motion of the plaintiff (R. 18, 19), struck from the Amended Answer the Affirmative Defenses and certain affirmative allegations contained in the Amended Answer relating, *inter alia*, to the defense that the plaintiff could not recover the unpaid balance of the purchase price since the contract of sale with respect to the onions in question, being violative of the Sherman Anti-Trust Act of 1890 (U. S. Code, Title 15, Section 1) was unenforceable (R. 33). In determining whether the District Court erred in making such a ruling and whether

the Circuit Court erred in affirming the ruling of the District Court, this Honorable Court, as it previously was incumbent upon said District Court and said Circuit Court, must ascertain whether an "insufficient" defense, within the contemplation of Rule 12(f) of the Federal Rules of Civil Procedure, was alleged, always keeping in mind the fundamental principle that, upon a motion to strike, all facts well pled by the defendant must be deemed to be true (*Town of River Junction v. Maryland Casualty Co.*, 110 F. 2d 278 (C. C. A. 5) (1940); *Barnidge v. United States*, 101 F. 2d 295 (C. C. A. 8) (1939); *Barron and Holtzoff, Federal Practice and Procedure*, Rules Edition, Volume I, Section 369, published in 1950).

Hence, in accordance with the above stated principle of law, it must be assumed, for the purpose of determining whether a sufficient defense was alleged, that:

(1) The plaintiff and one Sam Siegel, during the months of November and December, 1955, had in their possession or under their control some 600 carloads of onions in cold storage in the area of Chicago, Illinois and an additional 400 carloads of onions in storage in the country (R. 13, 14; Paragraph 1 of Affirmative Defenses) and plaintiff and his associate, Sam Siegel, represented to the defendant and to other persons who dealt in or grew onions that they, the plaintiff and Sam Siegel, owned said onions (R. 11; Paragraph 3 of Amended Answer).

(2) During the months of November and December, 1955, the plaintiff and Sam Siegel called three meetings in Chicago, Illinois for the purpose of determining whether the defendant and certain other growers of onions who possessed large quantities of onions in the country which were customarily sold through normal trade channels would agree to take and merchandise a portion of the 600 carloads of onions owned or controlled by the plaintiff and Sam Siegel in cold storage in Chicago, Illinois (R. 10;

Paragraph 2 of Amended Answer; R. 13, 14; Paragraphs 1 and 2 of Affirmative Defenses).

(3) At said meetings plaintiff and Sam Siegel represented to the defendant and the other onion growers that unless the defendant and the other onion growers purchased a large portion of the onions owned by the plaintiff, the plaintiff and Sam Siegel would deliver large quantities of onions on the futures exchange for the avowed purpose of depressing both the futures and cash market price of onions (R. 13, 14; Paragraph 1 of Affirmative Defenses).

(4) The defendant and the other onion growers feared that the delivery on the futures exchange of a large quantity of storage onions would seriously depress both the futures and the cash onion market, with attendant devastating economic consequences to them (R. 14; Paragraph 1 of Affirmative Defenses).

(5) At the second of said meetings, held on December 1, 1955 in Chicago, Illinois, the plaintiff and Sam Siegel agreed with the defendant and other onion growers that if the defendant and the other onion growers would purchase a portion of the 600 carloads of onions, the plaintiff and Sam Siegel would not deliver any onions on the futures market for the balance of the 1955-1956 trading season (R. 14; Paragraph 3 of Affirmative Defenses) and the defendant and the other onion growers, for their part, agreed to purchase from the plaintiff and Sam Siegel 287 carloads of onions (R. 15; Paragraph 4 of Affirmative Defenses).

(6) The defendant, as part of an overall program and as one facet of an overall agreement entered into between the plaintiff and Sam Siegel and the defendant and other onion growers, whereby the latter parties agreed to purchase the 287 carloads of onions and to desist from selling

them upon the futures market for the balance of the trading season in consideration of the promise of the plaintiff and Sam Siegel not to deliver any of the onions owned, held or controlled by them on the futures market for the balance of the 1955-1956 trading season, agreed to purchase fifty (50) carloads of onion from the plaintiff and Sam Siegel (R. 11; Paragraph 3 of Amended Answer).

(7) The avowed and express object of said agreement was to fix the price of onions and limit the amount of onions sold in the State of Illinois (R. 15; Paragraph 6 of Affirmative Defenses) to fix and manipulate the market price of onions and to stablize said price and, if possible, to increase their price, said onions being a part of interstate commerce (R. 15; Paragraphs 5, 7 and 8 of Affirmative Defenses), and to create a false and fictitious market condition (R. 11; Paragraph 3 of Amended Answer).[1]

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[1] The Circuit Court, in its Opinion (R. 49), stated that the allegation "the avowed and express object of said agreement was to fix the price of onions and limit the amount of onions sold in the State of Illinois, to fix and manipulate the market price of onions and to stabilize said price and, if possible, to increase their price, said onions being a part of interstate commerce, and to create a false and fictitious market condition" was a conclusion of law, rather than an allegation of fact. Counsel for defendant vigorously take issue with this interpretation. *Webster's New International Dictionary*, at page 160, defines the word "avowed" as meaning "openly acknowledged or declared" and, at page 773, defines the word "express" as meaning "directly and distinctly stated." The plaintiff and Sam Siegel had made it abundantly clear to the defendant and other onion growers that if they did not purchase a large portion of the onions then owned by the plaintiff and Sam Siegel, the plaintiff and Sam Siegel would "dump" large quantities of onions on the futures exchange in order to depress the futures and cash market price of onions (R. 14). Confronted with the prospect of economic catastrophy, the defendant and other onion growers agreed to purchase some 287 carloads of onions from the plaintiff and Sam Siegel (R. 11, 14, 15), with it being, as alleged, the actual object or, to use a synonym, purpose of the parties to fix the price of onions in order to stabilize their price or, if possible, in order to increase their price.

The issue to be resolved scarcely presents a matter of first impression, but rather it may be decided by applying the clear legal principles which were laid down by this Honorable Court in the case of *Continental Wall Paper Co. v. Louis Voight and Sons Co.*, 212 U. S. 227, 29 S. Ct. 280 (1908), principles which the Circuit Court held to be inapplicable to the factual situation presented (R. 49-55). The Circuit Court, instead, by the simple, although erroneous, process of misconstruing the *ratio decidendi* of the *Continental* case, *supra*, held that the instant cause is controlled by the holdings of this Court in the case of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 S. Ct. 431 (1902), and in its progenies, *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U. S. 165, 35 S. Ct. 398 (1915); *Small Co. v. Lamborn & Co.*, 267 U. S. 238, 45 S. Ct. 300 (1925); *Bruce's Juices, Inc. v. American Can Co.*, 330 U. S. 743, 67 S. Ct. 1015 (1947).

A reading of the *Continental* case, *supra*, pertinent extracts of which are set out below, as well as a reading of the other four cases above mentioned, leads inexorably to the conclusion that the factual situation herein presented closely parallels that which is found in the former case and that its rationale is dispositive of the question under discussion.

In the *Continental* case, *supra*, the plaintiff brought an action against the defendant to recover the sum of $56,762.10, the alleged balance on an account for merchandise sold and actually delivered. The defendant, as one of its defenses, asserted that it, along with the plaintiff and other corporations, was a party to an agreement, combination and conspiracy in restraint of trade in violation of the Sherman Anti-Trust Act of 1890 and that the contract of sale was an inherent part of the illegal scheme. The plaintiff's demurrer to this defense was overruled by the

trial court, which entered judgment for the defendant, and the ruling of the trial court was upheld by the Circuit Court of Appeals (*Continental Wall Paper Company v. Louis Voight and Sons Company,* 148 F. 939 (C. C. A. 6) (1906).) In affirming the judgment, this Honorable Court, speaking through Justice Harlan, first distinguished the *Connolly* case, *supra:*

> "But it is contended that however illegal the combination represented by the plaintiff may be, and whatever may be the effect of a judgment against the defendant, the plaintiff company is entitled to a judgment under the principles announced in *Connolly v. Union Sewer Pipe Co.,* 184 U. S. 540, 545, 46 L. ed. 679, 684, 22 Sup. Ct. Rep. 431. Let us see what that case was and whether it may not be distinguished from the one now before us.
>
> "The Union Sewer Pipe Company, a corporation of Ohio, doing business in Illinois, brought suit against Connolly, a citizen of Illinois, upon promissory notes given in Illinois, on account of the purchase by the defendant from that company, under contracts made in that state, of sewer pipe known as Akron pipe. It also brought suit against one Dee, a citizen of Illinois, upon an open account for the value of similar sewer pipe sold to him under a written contract, also made in that state. In each case the defendant disputed his liability for the value of the goods obtained from the Sewer Pipe Company upon the ground that, at the time of their respective purchases, that company was in a combination with certain firms, corporations, and companies engaged in the manufacture of Akron pipe, which combination, it was alleged, was in illegal restraint of trade, and forbidden by the principles of the common law, as recognized and enforced both in Ohio and Illinois. The defense was also made that the Sewer Pipe Company was a combination doing business throughout the United

States and between Ohio and Illinois, in the form of a trust, in restraint of trade and commerce among the several states, contrary not only to the anti-trust act of Congress of July 2d, 1890, chap. 647, but contrary to the Illinois anti-trust statute of January 1st, 1893, forbidding, under penalties, the combination of capital, skill, or acts for certain specified purposes. 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200. Ill. Laws 1893, p. 182; Hurd's Rev. Stat. (Ill.) 1899, p. 618, title 'Criminal Code'.

"The defense based upon the principles of the common law was overruled in the Connolly case, the court saying: 'Assuming, as defendants contend, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that they could, at common law, refuse to pay for pipe bought by them under special contracts with the plaintiff. The illegality of such combination did not prevent the plaintiff corporation from selling pipe that it obtained from its constituent companies, or either of them. It could pass a title by a sale to anyone desiring to buy, and the buyer could not justify a refusal to pay for what he bought and received by proving that the seller had previously, in the prosecution of its business, entered into an illegal combination with others in reference, generally, to the sale of Akron pipe.' Again, after referring to several cases establishing the general principle that a court will not lend assistance to carry out the terms of an illegal contract, and that one purchasing and receiving goods under a contract, expressed or implied, to pay for them, cannot refuse to pay simply because of the illegal character of his vendor, the court proceeded: 'In the present (Connolly) case other considerations must control. This is not an action to enforce or which involves the enforcement of the alleged arrangement or combination between the plaintiff corporation and other corporations, firms, and companies in relation to the sale of

Akron pipe. As already suggested, the plaintiff, even if part of a combination illegal at common law, was not, for that reason, forbidden to sell property it acquired or held for sale. The purchases by the defendants had no necessary or direct connection with the alleged illegal combination; for the contracts between the defendants and the plaintiff could have been proven without any reference to the arrangement whereby the latter became an illegal combination. If, according to the principle of the common law, the Union Sewer Pipe Company could not have sold or passed title to any pipe it received and held for sale, because of an illegal arrangement previously made with other corporations, firms, or companies, a different question would be presented. But we are aware of no decision to the effect that a sale similar to that made by the present plaintiff to the defendants respectively would, in itself, be illegal or void under the principles of the common law. The contracts between the plaintiff and the respective defendants were, in every sense, collateral to the alleged agreement between the plaintiff and the other corporations, firms, or associations whereby an illegal combination was formed for the sale of sewer pipe.'

"Turning to the defense based on the anti-trust act of Congress, the court in the Connolly case said: 'Much of what has just been said in reference to the first special defense based on the common law is applicable to this part of the case. If the contract between the plaintiff corporation and the other named corporations, persons, and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations, or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired

or which came into its possession for the purpose of being sold,—such property not being, at the time, if the course of transportation from one state to another or to a foreign country. *The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies, and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid.'* Further: 'Nor can the defendants refuse to pay for what they bought upon the ground that the 7th section of the Sherman act gives the right to any person "injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful" by the act, to sue and recover treble the damage sustained by him. We shall not now attempt to declare the full scope and meaning of that section of the act of Congress. It is sufficient to say that the action which it authorizes must be a direct one, and the damages claimed cannot be set off in these actions based upon special contracts for the sale of pipe that have no direct connection with the alleged arrangement or combination between the plaintiff and other corporations, firms, or companies. Such damages cannot be said, as matter of law, to have

directly grown out of that arrangement or combination, and are, besides, unliquidated. Besides, it is well settled in Illinois that " unliquidated damages arising out of covenants, contracts, or torts disconnected with plaintiff's claim cannot be set off under the statute".

"We need not here refer to that part of the Connolly case relating to the defense based on the anti-trust act of Illinois; for the court adjudged that act to be void because of a certain provision in it which, contrary to the Constitution of the United States, denied the equal protection of the laws to all persons within the jurisdiction of the state, except a named favored class.

"The present case is plainly distinguishable from the Connolly case. In that case the defendant, who sought to avoid payment for the goods purchased by him under contract, had no connection with the general business or operations of the alleged illegal corporation that sold the goods. He had nothing whatever to do with the formation of that corporation, and could not participate in the profits of its business. His contract was to take certain goods at an agreed price, nothing more, and was not in itself illegal, **nor part of nor in execution of any general plan or scheme that the law condemned.** *The contract of purchase was wholly collateral to and independent of the agreement under which the combination had been previously formed by others in Ohio. It was the case simply of a corporation that dealt with an entire stranger to its management and operations and sold goods that it owned to one who wished to buy them. In short, the defense in the Connolly case was that the plaintiff corporation, although owning the pipe in question and having authority to sell and pass title to the property, was precluding by reason* **alone** *of its illegal character from having a judgment against the purchaser. We held that that defense could not be sustained,*

either upon the principles of the common law or under the anti-trust act of Congress.'' (Emphasis by court in boldface; italic emphasis supplied (29 S. Ct. 290, 291).)

The Court then turned its attention to the case before it and enunciated the principle of law which fits the case now at bar like the proverbial glove:

> "The case now before us is an entirely different one. The Continental Wall Paper Company seeks, in legal effect, the aid of the court to enforce a contract for the sale and purchase of goods which, **it is admitted by the demurrer, was in fact and was intended by the parties to be based upon agreements that were and are essential parts to an illegal scheme.** We state the matter in this way because the plaintiff, by its demurrer, admits, for the purposes of this case, the truth of all the facts alleged in the third defense. It is admitted by the demurrer to that defense that the account sued on has been made up **in execution of the agreements** that constituted or out of which came the illegal combination formed for the purpose and with effect of both restraining and monopolizing trade and commerce among the several states.
>
> *"The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, 'to which both the plaintiff and the defendant were parties, and* **pursuant to which'** *the accounts sued on were made out, and which had for their object, and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continetal Wall Paper Company was organized. If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constitute the forbidden combination.* These considerations make it evident that

the present case is different from the Connolly case. In that case the court regarded the record as presenting the question whether a voluntary purchaser of goods at stipulated prices, under a collateral, independent contract, can escape an obligation to pay for them upon the ground merely that the seller, which owned the goods, was an illegal combination or trust. We held that he could not, and nothing more touching that question was decided or intended to be decided in the Connolly case.[2] *The question here is whether the plaintiff company can have judgment upon an account which, it is admitted by demurrer, was made up, within the knowledge of both seller and buyer, with direct reference to and in execution of certain agreements under which an illegal combination, represented by the seller, was organized. Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the states, and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends.* We hold that such a judgment cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may some-

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[2] Likewise, the *D. R. Wilder Mfg. Co.* case, *supra*, *Small Co.* case, *supra*, and *Bruce's Juices* case, *supra*, presented, in each instance, a situation where the defendant was not a party, but rather was a stranger to, the agreement which was violative in the cases of *Wilder* and *Small*, of the Sherman Anti-Trust Act of 1890 and in the case of *Bruce's Juices*, of the Robinson-Patman Act (U. S. Code, Title 15, Section 13, 13a) and where the defendant was seeking to avoid payment merely because of the illegal character of the seller.

times be to shield one who has got something for which, as between man and man, he ought, perhaps, to pay, but for which he is unwilling to pay.

"In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties. It is of no consequence that the present defendant company had knowledge of the alleged illegal combination and its plans, or was directly or indirectly a party thereto. Its interest must be put out of view altogether when it is sought to have the assistance of the court in accomplishing ends forbidden by the law.

"In *Hanauer v. Doane,* 12 Wall. 342, 349, 20 L. ed. 439, 441, this court said: 'The whole doctrine of avoiding contracts for illegality and immorality is founded on public policy. It is certainly contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed, for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members.'

"In *McMullen v. Hoffman,* 174 U. S. 639, 654, 669, 43 L. ed. 1117, 1123, 1128, 19 Sup. Ct. Rep. 839, 845, 851, where the authorities are reviewed and the whole subject carefully examined, the court said: 'The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract,'—citing many English and American cases. 'The court refuses to enforce such a contract, and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the

> defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law.'" (Emphasis by the Court in boldface; italic emphasis supplied (29 S. Ct. 291, 292).).

It is submitted that the following principles of law may be deduced from a reading of the five cases which represent the collective thinking of this Honorable Court in the area of law under discussion:

1. That where the seller and the purchaser enter into a contract to sell and purchase which is violative of the Sherman Anti-Trust Act of 1890, and the seller seeks to recover under the very contract which constitutes a violation of the Sherman Anti-Trust Act of 1890, the illegality "inheres" in the contract and the purchaser may successfully assert this illegality as a defense.

2. That where the seller and parties other than the purchaser enter into an agreement which is violative of the Sherman Anti-Trust Act of 1890 and the seller subsequently enters into a separate and distinct contract to sell and purchase with the purchaser, the illegality arising from a violation of the Sherman Anti-Trust Act of 1890 in the initial agreement is collateral to, and not inherent, in the contract to sell and purchase and the purchaser,

accordingly, cannot successfully urge, as a defense, the mere illegal character of the seller in a suit brought by the seller under the contract to sell and purchase.

While it is readily apparent to counsel for defendant that the distinction between the *Continental* case, *supra,* and the earlier *Connolly* case, *supra,* is that in the former the illegality "inhered" in the agreement upon which the seller sought to recover, whereas in the latter the illegality was collateral to the contract of sale upon which the seller sought to recover,[3] the Circuit Court attempted to, in its Opinion of June 23, 1958 (R. 51, 52) to explain the differences in the results reached by characterizing the alleged violations of the Sherman Anti-Trust Act of 1890 as "vicious" in the *Continental* case, *supra,* and as "innocuous" in the *Connolly* case, *supra.* Not only is there no basis in either the *Continental* case, *supra,* or the *Connolly* case, *supra,* to justify the distinction drawn by the Circuit Court, but also, it is submitted that the Sherman Anti-Trust Act of 1890 neither expressly nor implicitly recognizes that one violation thereof is more heinous than another, once a determination is made that a particular act or course of conduct does in fact constitute a violation.[4]

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[3] Precisely similar analyses of the distinction between the *Continental* case, *supra,* and the *Connolly* case, *supra,* have been made in the following cases decided by various Circuit Courts of Appeal, *Bell v. Lamborn,* 2 F. 2d 205 (C. C. A. 4) (1924); *Milliken-Tomlinson Co. v. American Sugar Refining Co.,* 9 F. 2d 809 (C. C. A. 1) (1925); *Lyons v. Westinghouse Electric Corporation,* 222 F. 2d 183 (C. C. A. 2) (1955); (accord: *Boatmen's Bank of St. Louis v. Fritzler, et al.,* 175 F. 185 (Circuit Court D. Kansas) (1909); *Fox Film Corporation v. C. & M. Amusement Co.,* 58 F. 2d 337 (D. C. S. D. Ohio) (1932)).

[4] Even if the test to determine whether a violation of the Sherman Anti-Trust Act of 1890 could be successfully urged as a defense in an

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When one comprehends the true distinction between the *Continental* case, *supra*, and the *Connolly* case, *supra*, and then indulges, as he must, upon a motion to strike, in the assumption that the averments of fact contained in the Affirmative Defenses and the Affirmative Allegations of the Amended Answer are verity, one is necessarily impelled to conclude that both the District Court and the Circuit Court erred in holding that the defendant had failed to allege a sufficient defense to the plaintiff's cause of action. The instant record presents a picture where the plaintiff is attempting to recover damages for the breach of the *very* agreement whose avowed purpose and object was to fix and manipulate the price of onions which constituted a part of interstate commerce (R. 11, 15). In other words, in contrast to the situation in the *Connolly* case, *supra*, the plaintiff herein, in order to prove his case, must ask and did ask the District Court to enforce the payment of the price of onions in pursuance of a contract which was intended by the parties to be and which was,

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action brought by the seller were to depend upon the relative seriousness of the violation, a standard of measurement which it is submitted would defy application, certainly, in view of the consistency with which this Court has condemned price fixing as being illegal *per se*, whether the prices fixed be reasonable or not (*United States v. Paramount Pictures*, 334 U. S. 131, 68 S. Ct. 915 (1948); *United States v. McKesson & Robbins, Inc.*, 351 U. S. 305, 76 S. Ct. 937 (1956); *United States v. New Wrinkle, Inc.*, 342 U. S. 371, 72 S. Ct. 350 (1952); *United States v. Frankfort Distilleries*, 324 U. S. 293, 65 S. Ct. 661 (1945); *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 60 S. Ct. 811 (1940)), the price fixing agreement herein alleged would necessarily have to be regarded as a grave violation of the Sherman Anti-Trust Act of 1890. In this respect, it should be noted that the Circuit Court, in its Opinion of June 23, 1958 (R. 54) intimated, without actually deciding, that the so-called condition of non-delivery was not illegal, notwithstanding the fact that the condition of non-delivery was the means, and understandably so in view of the law of supply and demand, by which the parties sought to stabilize the price of onions and, if possible, to increase their price.

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in fact, an agreement to fix prices. This is not a situation where the plaintiff and Sam Siegel agreed, conspired and combined to restrain trade in interstate commerce with X, Y, Z, etc., and subsequently the defendant, in a separate, independent and collateral agreement, purchased onions from one of the parties to the illegal combination and conspiracy, the factual situation existing in the *Connolly* case, *supra*, and in two of its three offsprings.[5]

This is, the record clearly reveals, a situation where, *aliunde* the agreement, an integral portion of which the plaintiff seeks to enforce, there is no pre-existing agreement, combination, or conspiracy in restraint of trade in interstate commerce. The defendant and other onion growers, having been informed by the plaintiff and Sam Siegel that the latter would flood the onion market and thus depress the price unless the former agreed to purchase a portion of 600 carloads of onions owned, held or controlled by the plaintiff and Sam Siegel (R. 13, 14; Paragraph 1 of Affirmative Defenses) and facing the unhappy alternatives of either purchasing a portion of said onions or suffering a severe pecuniary loss (R. 13, 14; Paragraph 1 of Affirmative Defenses), became unwilling parties to an agreement and members of a combination and conspiracy to fix and manipulate the price of onions which constituted a part of interstate commerce (R. 11; Paragraph 3 of Amended Answer; R. 15; Paragraphs 4, 5, 7, and 8 of Affirmative Defenses). This combination and conspiracy literally arose by virtue of the agreement by the terms of which the defendant and the other onion growers made promises to purchase 287 carloads of onions

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[5] In the case of *Bruce's Juices, supra*, the plaintiff allegedly was in violation of the Robinson-Patman Act, but, as was true in the *Connolly* case, *supra*, the *Wilder* case, *supra*, and the *Small* case, *supra*, the defendant was a stranger rather than a party to the alleged violation and thus he could not successfully urge the violation as a defense.

and to refrain from selling these onions upon the futures market during the 1955-56 trading season, in return for which the *quid pro quo* to be received by them from the plaintiff and Sam Siegel, in addition to the promise of the latter men to deliver the onions, was their promise to forbear from selling any other onions owned, held or controlled by them during the balance of the trading season upon the futures market, the avowed and express object and purpose of the agreement being to create a fictitious market condition in onions, to fix the price at the then prevailing price or, if possible to increase the price (R. 11; Paragraph 3 of Amended Answer; R. 14, 15; Paragraphs 3, 4, 5, 7 and 8 of Affirmative Defenses).

In view of the terms of this agreement and in view of the fact that the sale of the fifty (50) carloads of onions to the defendant was in pursuance of the agreement and was an essential part thereof, this Honorable Court's decision in the *Continental* case, *supra,* would certainly sustain the premise of defendant that a legally sufficient defense, invulnerable to attack by a Motion to Strike, was alleged and that the District Court erred in striking the Affirmative Defense predicated upon an alleged violation of the Sherman Anti-Trust Act of 1890.

In an apparent effort to avoid the inevitable consequences of applying the holding of this Honorable Court in the *Continental* case, *supra,* to the facts before it, the Circuit Court attributed to the word "inhere" a different meaning than that placed upon the term by this Honorable Court in the *Continental* case, *supra.*[6] The Circuit

[6] A reading of the Circuit Court's Opinion of June 23, 1958 (R. 52) clearly indicates that its ultimate decision was somewhat dictated by the fact that it considered it to be an incongruous result to allow a party *in pari delicto* to avoid payment, whereas a stranger, innocent of any

(Continued on next page)

Court, by ignoring the true purpose of the overall agreement between the plaintiff and Sam Siegel, on the one hand, and the defendant and the other onion growers, on the other hand, sought to segregate and isolate the so-called condition of non-delivery from the other terms and conditions of the agreement and then concluded that the defendant's promise to pay for the fifty (50) carloads of onions was supported by the lawful consideration of the plaintiff's promise to deliver said onions (R. 54, 55). The Circuit Court took the position that since the plaintiff was not seeking to enforce the mutual promises to refrain from delivering onions during the balance of the trading season upon the futures market, the illegality, if any, in these mutual promises was collateral to, rather than inherent in, the promise of the defendant to pay for the fifty (50) carloads of onions (R. 54, 55) and that, accordingly, the de-

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(Continued from preceding page)

wrongdoing, would not be allowed to successfully urge a violation of the Sherman Anti-Trust Act of 1890 as a defense. The fallaciousness of the Circuit Court's reasoning in this respect is obvious. Whenever the illegality "inheres" in the contract, the aid of the Court is denied, in the language of this Honorable Court at 29 S. Ct. 292 "not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of inidividual parties". Public policy considerations require that the Courts allow those who are *in pari delicto* to remain in a *status quo* in order to deter future wrongdoers from entering into illegal contracts, the theory being that to refuse to grant judicial aid to either party tends strongly towards reducing the number of such transactions to a minimum (29 S. Ct. 291). In fact, this Honorable Court, in the *Continentanl* case, *supra*, considered the public policy against the enforcement of illegal agreements to be of such vital importance that its ruling therein resulted in an appreciable windfall to the defendant, who actually took delivery of all the merchandise and then refused to pay for same. By contrast, no such windfall would accrue to the defendant herein if, as it is contended by counsel for defendant, the parties to the illegal contract are left in the *status quo*. In this respect, the record reveals that whereas the defendant had paid the plaintiff the sum of $12,500.00 on account (R. 3, 11), he only took delivery of some 13 carloads of onions, the contract price of which in toto was $11,480.00, plus storage charges (R, 3, 4, 11, 12).

fendant would not be allowed to import into the promise to pay the illegality, if any, embodied in the mutual promise to refrain from delivering onions for the balance of the trading season upon the futures market (R. 54, 55). It is quite obvious that the conclusion reached by the Circuit Court herein is not supported by the decision of this Honorable Court in the *Continental* case, *supra,* for it is most important to observe that in the *Continental* case, *supra,* this Court held that the actual receipt (not merely, as herein, an unexecuted promise of the plaintiff to deliver) of the merchandise by the defendant was not a sufficient legal consideration upon which the duty of the defendant to pay could be enforced, since the rendering of a judgment for the plaintiff would be tantamount to affording him the aid of the judiciary in enforcing an agreement which constitutes a direct violation of the Sherman Anti-Trust Act of 1890.[7]

Similarly, the plaintiff herein is seeking to invoke the assistance of the District Court to enforce, not a lawful contract to sell and purchase, but rather an unlawful contract to sell and purchase, which came into existence for

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[7] The Circuit Court primarily bottomed its conclusion that the assumed illegal condition or covenant, to-wit, that of non-delivery, could be separated from the lawful promise for a lawful consideration upon the case of *Cincinnati, Portsmouth, Big Sandy, and Pomeroy Packet Co. v. Bay,* 200 U. S. 179, 26 S. Ct. 208 (1906), but the *Cincinnati* case, *supra,* unlike the *Continental* case, *supra,* is readily distinguishable from the case at bar in that in the former case, this Court, which was, at the outset, dubious as to whether the purchaser's agreement to maintain rates even pertained to interstate commerce, noted that said agreement to maintain rates was not alleged to have entered into the consideration of the sale, whereas here the promise of the defendant and the other onion growers to purchase the 287 carloads of onions was expressly alleged to be in consideration of the promise of plaintiff and of Sam Siegel not to deliver any of the onions owned, held or controlled by them upon the futures market for the balance of the 1955-1956 trading season (R. 11, 14).

the very purpose of fixing the price of onions in interstate commerce. This agreement, in direct violation of the Sherman Anti-Trust Act of 1890 and thus permeated with illegality, cannot be enforced for the reasons set forth in the *Continental* case, *supra*. It is thus submitted that error was committed by the District Court in striking the affirmative defense and certain affirmative allegations contained in the Amended Answer wherein this violation is set forth as a defense to the plaintiff's claim.

PRAYER

Wherefore, it is respectfully submitted that the Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit be vacated, that the Judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, be vacated, that the Order of said District Court striking the Affirmative Defense and certain affirmative allegations contained in the Amended Answer be vacated, and the cause be remanded to said District Court for a hearing on the merits, in accordance with the Opinion and Judgment of this Honorable Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 267

JACK H. KELLY,
Petitioner,

vs.

VINCENT W. KOSUGA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT.

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January 5, 1959

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BRIEF FOR RESPONDENT.

STATEMENT.

The essential facts are undisputed. Kosuga, the plaintiff-respondent, sold to Kelly, the defendant-petitioner, fifty carloads of onions in storage in Chicago for a price of $960 per car, or $48,000 plus storage charges. Payment of the purchase price was to be made in installments. Petitioner made partial payments and withdrew from storage thirteen cars of onions, which he merchandised. The market price for onions fell sharply,[1] and petitioner refused to accept further deliveries or to make

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[1] See petitioner's amended answer and counterclaim, R. 16; respondent's reply, R. 20; Black affidavit R. 36.

further payments of the price. After notice, respondent disposed of the remaining cars at the going market price and applied the proceeds in mitigation of damages. As part of the sale transaction, the seller (respondent) agreed that he would not deliver other onions which he owned, in satisfaction of futures contracts on the Chicago Mercantile Exchange, but would merchandise them through regular trade channels (R. 14). The defense is that on account of this non-delivery agreement, the contract was in violation of Section 1 of the Sherman Act, and therefore unenforceable.[2]

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[2] The amended answer set forth a counterclaim which the District Court dismissed (R. 43). The Court of Appeals specifically affirmed this dismissal (R. 57). Neither the petition for certiorari nor petitioner's brief refers to the counterclaim, and any claim of error with respect thereto must be taken as abandoned.

At earlier stages petitioner also suggested involvement of the Commodity Exchange Act and the Illinois antitrust laws, but the petition for certiorari abandons reliance on anything other than Section 1 of the Sherman Act.

SUMMARY OF ARGUMENT.

I. The sole question presented is abstract and hypothetical and, if the Court has jurisdiction at all, it is questionable whether the adjudication of such a question is a provident exercise of this Court's discretionary jurisdiction.

II. Assuming the illegality of the agreement not to deliver the commodity in satisfaction of futures contracts, such illegality is not in this case a defense to the seller's action for the contract price.

a. It is not true, as petitioner contends, that the decisions of this Court establish that the defense of illegality under the antitrust laws is available to guilty participants in the illegal scheme, such as petitioner proclaims himself to be, and not to innocent "strangers" to the illegal bargain.

Bruce's Juices v. *American Can Co.*, 330 U.S. 743 (1947)

D. R. Wilder Mfg. Co. v. *Corn Products Ref. Co.*, 236 U.S. 165 (1915)

Connolly v. *Union Sewer Pipe Co.*, 184 U.S. 540 (1902)

A. B. Small Co. v. *Lamborn & Co.*, 267 U.S. 248 (1925)

Continental Wall Paper Co. v. *Louis Voight & Sons Co.*, 212 U.S. 227 (1909)

b. The true principle which has informed the Court's decisions is that the defense of illegality under the anti-trust laws will be allowed only where the relief sought would aid in the consummation of the unlawful purpose; the defense will not be allowed where a judgment for the price of goods sold will not aid the unlawful purpose, but will operate only to prevent unjust enrichment and discriminatory penalties.

Bruce's Juices v. *American Can Co.*, 330 U.S. 743 (1947)

D. R. Wilder Mfg. Co. v. *Corn Products Ref. Co.*, 236 U.S. 165 (1915)

Connolly v. *Union Sewer Pipe Co.*, 184 U.S. 540 (1902)

A. B. Small Co. v. *Lamborn & Co.*, 267 U.S. 248 (1925)

Continental Wall Paper Co. v. *Louis Voight & Sons Co.*, 212 U.S. 227 (1909)

c. To allow the defense of illegality in this case would not advance the policy of the Sherman Act, but on the contrary would interfere with the policy of that act by establishing a rule which would hamper commerce and inhibit credit transactions, bearing most harshly upon the necessitous buyer who lacks the resources to do business on a cash basis; further, to allow the defense in this case would be to assist and encourage an unscrupulous buyer to speculate at the risk of the seller and to enrich himself unjustly.

Bruce's Juices v. *American Can Co.*, 330 U.S. 743 (1947)

III. Even if the assumed illegality of the non-delivery agreement constitutes a defense to the claim for the contract price, respondent is entitled to recover the reasonable value of the goods sold, which in this case is the contract price.

Bruce's Juices v. *American Can Co.*, 330 U.S. 743, 759 (1947) (dissenting opinion)

Penn-Allen Cement Co. v. *Phillips & Sutherland*, 182 N.C. 437, 109 S.E. 257 (1921)

Continental Wall Paper Co. v. *Louis Voight & Sons Co.*, 212 U.S. 227, 261 (1909)

Rosasco Creameries, Inc. v. *Cohen*, 276 N.Y. 274, 11 N.E. 2d 908 (1937)

ARGUMENT.

I.

THIS CASE PRESENTS A SINGLE QUESTION, WHICH IS ABSTRACT AND HYPOTHETICAL. ASSUMING THAT THE COURT HAS JURISDICTION AT ALL, IT IS QUESTIONABLE WHETHER THE ADJUDICATION OF SUCH A CASE IS A PROVIDENT EXERCISE OF THIS COURT'S DISCRETIONARY JURISDICTION.

We feel it incumbent upon us to draw the Court's attention to the somewhat peculiar posture of the case as it is presented by the petition for *certiorari* and the petitioner's brief. A single question is presented, which we may state thus: *Assuming* that the restriction on making deliveries in satisfaction of futures contracts violated Section 1 of the Sherman Act, does it follow that this illegality is available to the petitioner as a defense in an action for the contract price or for the reasonable value? The question of illegality is not discussed in either the petition for *certiorari* or in the petitioner's brief. It is presented to the Court only to the extent that petitioner's statement of the question is effectual for that purpose (Petition 2-3, Brief 2-3). Apparently petitioner assumes that illegality, having been alleged in the amended answer, must be taken as established for purposes of review here. While fully acknowledging the rule that, on motion to strike, the allegations of the adverse pleading must be taken to be true, we point to the equally familiar principle that this rule applies only to facts well-pleaded, and not to arguments and conclusions, especially respecting matters of law. The allegation of fact, that the agreement included a promise not to deliver the onions sold and certain others in satisfaction of futures contracts but to merchandise them in

normal trade channels, was admitted by the motions (indeed it was admitted by respondent's reply, R. 21). Beyond this, all the averments of the amended answer relating to the question of illegality, such as that the contract was "null and void under the provisions of the Sherman Anti-Trust Act" (R. 15), are conclusory and argumentative. This characterization applies to allegations as to the purpose of the condition relating to deliveries on futures contracts; it applies with special force to petitioner's allegation, reiterated in this Court, that this was a "price-fixing" agreement (R. 15, Brief for Appellant [petitioner] 3, 7, 8, 11, 23-24, 23 fn. 4, 28) that being not only a conclusion but one which is patently inconsistent with the facts pleaded. The Court of Appeals properly separated the facts well-pleaded from those of a conclusory and argumentative nature (R. 48-49).

That the non-delivery provision was a violation of the Sherman Act is *not* admitted, by the motions filed by respondent in the District Court or otherwise. The District Court held that the provision was "a reasonable restriction to assure defendant [petitioner] the enjoyment of the legitimate fruits of his contract of purchase, and to protect him from a possible derogation in the value of the property bought. This condition does not constitute an illegal restraint of trade proscribed in the . . . antitrust laws" (R. 25). The Court of Appeals, while finding it unnecessary to decide the question of illegality, indicated its agreement with the District Court.[3]

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[3] "Assuming that which we think doubtful, that is, that the non-delivery agreement was illegal, there is no more reason here than there was in **Wilder** for importing such elements of wrong into an otherwise legal and valid contract." (R. 54. See also Brief p. 23, fn. 4).

The situation, then, is this: If this Court affirms the judgment below, holding in accordance with our submission that even if illegality is assumed the petitioner is liable for the contract price, that is an end of the matter. *Cf. Bruce's Juices, Inc.*, v. *American Can Co.*, 330 U.S. 743, 747 (1947). On the other hand, if the Court should agree with the petitioner as to the effect of illegality upon the rights of the parties between themselves, the consequence would be a reversal with remand for further proceedings. In such proceedings, while the effect of illegality would be settled, the question of illegality itself would remain open. The District Court, however, has already ruled on that question and presumably would so rule again upon remand.

It is no answer to say that the Court may pass upon the question of illegality in this proceeding. The petitioner has not briefed that question. Moreover, while the factual allegations of the amended answer, assumed true for the purpose of disposing of the motions, may permit the District Court to determine that the condition was reasonable and legal, an ultimate holding of illegality may not be made on review here, since it would necessitate taking into account the allegations and denials in respondent's reply as well as all of the surrounding factual circumstances, and these, of course, do not appear on this record. In a substantial sense, therefore, petitioner is asking this court to rule upon an abstract and hypothetical question and it is submitted that such an adjudication would not be a provident exercise of this Court's discretionary jurisdiction.

II.

ASSUMING THAT THE NON-DELIVERY CONDITION WAS A VIOLATION OF THE SHERMAN ACT, THAT CIRCUMSTANCE DOES NOT CONSTITUTE A DEFENSE TO THE BUYER IN AN ACTION BY THE SELLER TO RECOVER THE CONTRACT PRICE.

Petitioner invokes the jurisdiction of this Court to obtain relief from the obligation to pay for goods bought at a price which, it is not denied, was fair and reasonable. His ground for so doing is that, while he enjoyed the benefits of the bargain, he was, according to his own protestations, an active participant in a scheme to violate the laws of the United States. Few litigants have been so candid as petitioner. He does not leave it to the Court, nor to his adversary, to characterize such a defense as dishonest and anomalous, but on his own initiative quotes this Court's statement in *McMullen* v. *Hoffman,* 174 U.S. 639, 669 (1899), repeated in *Continental Wall Paper Co. v. Louis Voight & Sons Co.,* 212 U.S. 227, 263 (1909):

> "It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it. . . ." (Brief 20-21).

Apparently petitioner would have the Court believe that it is only because of his concern for the public welfare that he comes here, proclaiming his complicity in an illegal scheme, demanding relief from the obligation to pay for goods bought at a fair price, and invoking the discretionary jurisdiction of this Court to give him this "very dishonest" defense which the courts below have denied him. This sacrificial attitude deserves consideration by the Court in exact proportion to its nobility.

Petitioner would read the decisions of this Court as holding that, when a contract for the sale of goods is tainted with illegality, only the innocent must pay for benefits received; the rewards of unjust enrichment are reserved for the guilty. It is for this reason that we are treated to the strange spectacle of the petitioner taking considerable pains to implicate himself as an active participant in the alleged conspiracy, emphasizing his allegedly unlawful motives (Affirmative Defense, pars. 1, 4-8, R. 13-15; Brief, 10-11). Actually, on this reading of the case, petitioner perhaps did not blacken his conduct sufficiently; perhaps he would have been well advised to admit our allegation that it was the petitioner himself who imposed the non-delivery provision (R. 21). For it may not be sufficient for a party to picture himself merely as the frightened victim of conspiracy, acquiescing with reluctance (*cf.* the dissenting opinion of Mr. Justice Holmes in the *Continental Wall Paper* case, 212 U.S. at 270-271); he would enjoy the maximum chance of realizing upon his "very dishonest" defense if he makes himself out a prime conspirator.

But the decisions of this Court establish no such absurdities as these. To the extent that there are expressions in the opinions which might lend color to such an interpretation, this case affords the Court an opportunity to rectify them.

Petitioner's interpretation of the precedents is belied at the outset by the Court's most recent decision in point, *Bruce's Juices, Inc.*, v. *American Can Co.*, 330 U.S. 743 (1947). That case involved the Robinson-Patman Act rather than the Sherman Act, and we acknowledge that on that account some differences may be taken; nevertheless, the decision is fundamentally significant for the case at bar. Consistently with his general view of the cases

as authorizing unjust enrichment of the guilty while requiring the innocent to pay for goods bought, petitioner would distinguish *Bruce's Juices* on the ground that there "the defendant was a stranger rather than a party to the alleged violation and thus he could not successfully urge the violation as a defense." (Brief, 24, fn. 5). This Court, however, held just the opposite. Speaking through the late Mr. Justice Jackson, the Court said:

> ". . . [W]hen they [quantity discounts] are illegal it is as much a violation to accept or receive as to allow them. Bruce, in one of the years included in its balance of account, purchased more than a half million dollars of cans on which it received precisely the kind and amount of discount it now asserts to be illegal." (330 U.S. at 746).

Thus the Court denied the defense of illegality although the buyer was *in pari delicto*. The suggestion that the cases are to be explained on the ground that the innocent are mulcted while the guilty are rewarded is a vicious over-simplification which stultifies the law and refuses to credit this Court over the years with elementary intelligence.

The true principle which has, on the whole, consistently informed the Court's decisions in cases of this kind is thus stated in *Bruce's Juices:*

> "But when the contract sued upon is not intrinsically illegal, the Court has refused to allow property to be obtained under a contract of sale without enforcing the duty to pay for it because of violations of the Sherman Act not inhering in the particular contract in suit and has reaffirmed the 'doctrine that "where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that

which the statute prescribes.'" *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U.S. 165, 174-175; *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540." (330 U.S. at 755).

The distinction between "an agreement . . . . which has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought" (330 U.S. at 755) and a contract which is "not intrinsically illegal" may not be easy to apply in all situations (*cf.* the opinion of Judge Learned Hand in *Lyons* v. *Westinghouse Elect. Corp.*, 222 F.2d 184, 187 (2d Cir., 1955); yet enlightenment as to its purpose and effect is readily available. In *Bruce's Juices* the Court said that the judicial annexation of the sanction of loss of remedy to a statute which does not expressly provide for such a sanction is justified "only if it would be at least a rational, *nondiscriminatory* and appropriate means of making the policy of the statute effective. To allow a buyer to get his goods for nothing because the seller violated the Act . . . does not meet this test." (330 U.S. at 752 italics added). The Court went on to demonstrate in terms fully applicable to the case at bar the capricious and discriminatory way in which such a sanction operates:

> "It would seem that one test of the rationality and appropriateness of such a defense because of a violation of the Act would be that the reparation it permits should be measured at least roughly by the extent of the injury caused by the violation. This, of course, is the principle of the suit for triple damages. But that is not the principle of the defense here urged. The extent of its indemnity is not measured by injury. . . . *It is measured solely by the amount of credit the buyer obtained from the seller.* The seller would lose the amount carried in notes or in open account. Had Bruce's delinquency been greater,

so would its gain; had there been no credit asked or given the buyer could have had no remedy by way of defense." (330 U.S. at 753 italics added)

In the case at bar the petitioner alleges no damage whatever on account on the non-delivery agreement. He could not, therefore, maintain an action for treble damages, although the Sherman Act as well as the Robinson-Patman Act of course provides such a remedy. The gain which would accrue to him under the asserted defense would bear no relation whatever to indemnity but would be pure unjust enrichment. In the case at bar, by virtue of the terms on which respondent extended credit to petitioner, the penalty which would be inflicted upon respondent if the defense were allowed would be $37,243.80 (Findings of Fact, R. 42). This is a fantastic penalty by comparison with any fine which might conceivably have been inflicted in any conceivable criminal prosecution; and it would go not into the public treasury but into the pockets of a self-proclaimed participant in the "conspiracy." The penalty suffered by respondent would be greater had he been more generous in the credit terms extended to petitioner; it would be reduced to zero if cash payment had been required. It is small wonder that the Court observed that the effect of allowing such a defense would be to discourage the extension of credit, thus hampering commerce and bearing most harshly on those businessmen who lack the resources to do business on a cash basis. Certainly the policy of the Sherman Act is not advanced by such consequences.

Progressive courts have long recognized that the common law tendency to inflict forfeiture of contract rights as a penalty for fault operates in an arbitrary, capricious, and discriminatory manner. See the leading case of *Britton* v. *Turner*, 6 N.H. 481, 26 Am. Dec. 713 (1834).

The petitioner's contention would require a throwback to the kind of thinking which formerly led some courts to make civil outlaws of persons violating Sunday laws. *Cf. McGrath* v. *Merwin*, 112 Mass. 467, 17 Am. Rep. 119 (1873); *White* v. *Levarn*, 93 Vt. 218, 108 Atl. 564 (1918).

The essence of the principle stated in *Bruce's Juices* is that the Court will entertain the defense of illegality only where the contract "has as its object and effect accomplishment of illegal ends *which would be consummated by the judgment sought.*" (330 U.S. at 755). The judgment against respondent for the unpaid portion of the contract price has no tendency whatever to further or consummate the agreement respecting non-delivery on the futures market. In this respect the case before the Court is even stronger for disallowing the defense than *Bruce's Juices*, since there it was contended that the judgment had the effect of enforcing collection of an allegedly illegal component of the price—the difference between the price charged the defendant buyer and the lower prices charged to competitors. Here there is no possible basis for a suggestion that the judgment would further any illegal scheme; the sale price is concededly fair and reasonable.

The distinction between a judgment which would consummate an illegal scheme and one which would have no effect other than to require a party to pay the fair value of property which he obtained in the transaction is the very distinction which is sometimes expressed in terms of whether the illegality is "inherent" in the promise sought to be enforced or is "collateral" thereto. Such abstractions can give rise to difficulties of application, but those difficulties may be minimized if the practical purpose of the distinction is kept in mind. Assuming the illegality of the non-delivery agreement, we think it clear that no court would enforce it, as by enjoining one of the

parties from making deliveries on the futures market. On the other hand, where the judgment cannot have the effect of advancing any illegal purpose, the defense of illegality can serve no policy except the unthinkable one of permitting one person to appropriate the property of another without compensation (*cf.* 330 U.S. at 751). We might seek to buttress this point with the statement that in this case the non-delivery promises were "separable" from, or "collateral" to, the sale agreement; but it seems to us that such concepts do not help to clarify the argument, and that emphasis should be placed instead on the basic principle and its practical operation. *Cf.* 6 Corbin on Contracts Sec. 1520 (1951); Gellhorn, Contracts and Public Policy, 35 Colum. L. Rev. 679, 683 (1935).

Here again *Bruce's Juices* provides a practical guide to the situations in which the defense of illegality will be allowed and those in which it will not:

> "If, in order to prove his own case, a plaintiff proves his violation of law, then no court will aid the plaintiff to recover. Here, however, what the plaintiff must show is the notes which import consideration. If consideration is denied, he can prove that cans were sold and delivered at a stated price. That is no violation of law." (330 U.S. at 756).

So here, the respondent made his *prima facie* case by setting out the sales agreement, which is in no way dependent upon the non-delivery provision (see Exhibits attached to Complaint, R. 6-10). We do not mean, and we do not believe the Court meant, that the allowability of the defense depends upon the technicalities of pleading. The virtue of the test lies in the fact that, where the relief sought will consummate an illegal purpose, that fact is likely to be disclosed by the plaintiff's statement of his case. There may well be instances in which de-

fensive pleadings may show that the judgment, if rendered, would advance an illegal scheme, in which case the defense should be allowed. *Cf.* 6 Corbin on Contracts Sec. 1533 (1951). We do suggest that the test set out in *Bruce's Juices* is a useful, though tentative, guide to the situations in which the defense should be allowed, and that in the case at bar the whole record may be searched without yielding any indication that the judgment below can possibly advance any illegal purpose.

The case of *D. R. Wilder Mfg. Co.* v. *Corn Products Ref. Co.*, 236 U.S. 165 (1915), is likewise inconsistent with petitioner's interpretation of the cases as requiring only innocent "strangers" to the illegal agreement to pay for goods bought (Brief, 19 fn. 2, 24 fn. 5). Discussion of the case is somewhat complicated by the fact that there the defendant contended that the plaintiff, as a consequence of its being a monopolistic combination, had "no legal existence" (236 U.S. at 169), and much of the opinion of the Court was devoted to the rejection of this unusual statement of the defense. The fact remains that the case was presented to the Court as one in which the plaintiff was a combination of all the manufacturers of glucose in the United States, and in which, as part of its monopolistic plan, it had induced buyers to agree, in consideration of a system of rebates, to purchase their requirements exclusively from the plaintiff and not to resell the product. The defendant buyer had signed such a contract and thus was no "stranger" to the scheme but an active participant in it; indeed, the buyer counterclaimed for the amount of the rebate pursuant to the scheme to which he was a party (236 U.S. at 171). The Court said:

> " . . . [T]he right to enforce the sale did not involve the question of combination, since, conceding the illegal existence of the corporation making the sale,

> the obligation to pay the price was indubitable, and the duty to enforce is not disputable. This is true because the sale and the obligations which arose from it depended upon a distinct contract, with reciprocal considerations moving between the parties, —the receipt of the goods on the one hand, and the payment of the price on the other. And this is but a form of stating the elementary proposition that courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so, or some remote aid to the accomplishment of a wrong which might possibly result,—doctrines of such universal acceptance that no citation of authority is needed to demonstrate their existence, especially in view of the express ruling in *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, applying them to the identical general question here involved." (236 U.S. at 172).

The decision thus most certainly did not go on the ground that the buyer was an innocent stranger to the monopolistic scheme, but rather on the ground that the mere circumstance that the seller may benefit, even to the extent of realizing a profit on the sale, is not sufficient cause for departing from the usual rule that contracts will be enforced. Something more by way of advancement of the illegal scheme is required before the defense of illegality will be heard.

In *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540 (1902), and *A. B. Small Co.* v. *Lamborn & Co.*, 267 U.S. 248 (1925), the extent of the buyer's participation, if any, in the illegal arrangement does not appear. There is not a word in either decision, however, to support the notion that the buyer was required to pay for the goods sold because he was an innocent bystander rather than a guilty participant. The basis for the holding in both cases was simply that the appropriate sanctions for violation of the Sherman Act are those set out in the Act

itself, and that the just obligations of a contract will be enforced where the relief sought will not directly advance the illegal purpose.

Of all the relevant decisions of this Court, only one suggests even an apparent or temporary deviation from the principle here suggested. *Continental Wall Paper Co.* v. *Louis Voight & Sons. Co.*, 212 U.S. 227 (1909). Petitioner necessarily places sole reliance on this decision. We submit that even this reliance is misplaced. The consistency of the *Continental* decision with the other decisions of this Court can be shown, and has in fact been demonstrated by the Court itself in subsequent cases. That *Continental* is consistent with *Connolly*, the Court's pioneer decision in this area, is indicated at the outset by the fact that the opinion of the Court in each case was written by Mr. Justice Harlan. In *Continental* the Court was divided five to four on the issue presented, Mr. Justice Holmes and Mr. Justice Brewer writing dissenting opinions. We submit that, as in the other decisions of this Court, there is no basis whatever in this decision for the suggestion that the availability of the defense of illegality turns upon the success of the buyer's unbecoming effort to incriminate himself.

It is true that in *Continental* the buyer, a participant in the conspiracy, was allowed to assert the defense of illegality in an action for the price of goods sold and delivered. But the fact that the buyer was a guilty participant in the scheme was not the reason for allowing the defense. Mr. Justice Harlan said specifically, "it is of no consequence that the present defendant company had knowledge of the alleged illegal combination and its plans, or was directly or indirectly a party thereto." (212 U.S. at 262). The reason for allowing the defense was that the majority of the Court believed that to do other-

wise would be "to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination." (212 U.S. at 261). In other words, the relief sought would not merely result in the buyer's paying a just price for the goods, to the possible profit of the seller, but would otherwise, and directly, further the aims of the combination. "It is admitted by the demurrer to that defense that the account sued on has been made up *in execution of the agreements* that constituted or out of which came the illegal combination formed for the purpose and with effect of both restraining and monopolizing trade and commerce among the several states." (212 U.S. at 261—italics in the original). Again, the Court said that the judgment sought would "give effect, as far as it goes, to agreements that constituted that combination, and *by means of which the combination proposes to accomplish forbidden ends.*" (212 U.S. at 262—italics added). Mr. Justice Harlan distinguished his own holding in the *Connolly* case at length. Much emphasis was given to the fact that in *Connolly* the defense asserted went to the illegal character of the combination as such, and to the fact that the contract of sale was "collateral" to the existence of the illegal combination. A discriminating interpretation of the distinction reveals, however, that what was important was that in *Connolly* the relief sought would not advance the objectives of the conspiracy, while in *Continental* it would.

A brief review of the facts in *Continental* will make the point clear. Manufacturers of 98 per cent of the wallpaper produced in this country determined to control prices and production through a joint committee which was to "adopt rules and regulations governing the manner of conducting the business" of the participants. This committee was established as the board of directors of a dummy corporation, Continental, which had no function

except as the instrument through which the conspiracy was effected. Yet one of the functions assigned to it was that of exclusive selling agent of the manufacturers, the corporation taking title to all their output for that purpose. Jobbers and other wholesalers were required to sign contracts to buy their entire requirements from the corporation, and to agree to restraints upon their freedom in determining prices upon resale. Moreover, the defendant alleged that, by virtue of the conspiracy, the prices in the account on which suit was based were unreasonable and excessive:

> "'The allegations in said plaintiff's petition set forth as a suit on account are an attempt to enforce, carry out, and recover upon and by virtue of said unlawful combination, aforesaid, *the prices fixed by such combination, and the prices therein sought to be recovered for said merchandise are unreasonable, excessive, and above the fair market price of such merchandise by more than the amount so sought to be recovered.*'" (212 U.S. at 253. The italics are in Mr. Justice Harlan's statement of the case).

Plainly the Court felt that to grant the relief sought would further the aims of the conspiracy in two ways: (1) a judgment in favor of the dummy corporation, which was not the real party in interest, was not the seller of the goods and which had no function other than that of directing and policing the conspiracy, would directly aid the unlawful scheme; and (2) the object of the conspiracy being to increase prices artificially, and that object having been accomplished to the extent that the prices in the contracts in suit were themselves artificial and excessive, being the very prices the conspirators had agreed to charge, the enforcement of the obligation to pay those prices would make the Court a party to the consummation of the illegal purpose.

It is apparent that, thus interpreted, the *Continental* case is no authority against the enforcement of the contract in the case at bar. If the non-delivery agreement here was designed to stabilize prices on the futures market, that purpose had nothing to do with the price charged in this sale of actual onions. The price charged upon the sale of the actual commodity was the going market price, unaffected by any agreement of the parties, and was fair and reasonable. Enforcement of the duty to pay that price could have no tendency whatever to further the alleged purpose of stabilizing market prices.

This interpretation of *Continental* is forcefully supported by the fact that, in later Sherman Act cases such as *Wilder* (236 U.S. 165) and *Small* (267 U.S. 248), where it did not appear that the judgment would advance the purposes of the conspiracy directly by enforcing excessive prices or otherwise, the defense of illegality was not allowed.[4] Indeed, in *Wilder* the Court pointed to the following distinguishing factors in the *Continental* case:

> "(a) the relations of the contracting parties to the goods sold, (b) the want of real ownership in the seller, (c) the peculiar obligations which were imposed upon the buyer, and (d) the fact that to allow the nominal seller to enforce the payment of the price would have been, in and of itself, directly to sanction and give effect to a violation of the anti-trust act inhering in the sale." (236 U.S. at 177).

It is clear, that in points (a), (b) and (d) the Court was saying, as we have said, that to allow the dummy corporation to recover the price, when that corporation had no

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[4] In none of the lower court decisions cited by petitioner in his brief page 22 fn. 3, was the claim of alleged antitrust illegality permitted as a defense to an action for goods sold and delivered.

reason for existence except as the indispensable instrument of the conspiracy, would have been to aid and abet the illegal scheme, while the refusal to recognize that agency of the conspirators might well be a death blow to the on-going conspiracy.

Mr. Justice Harlan's efforts to distinguish his prior holding in *Connolly* were not convincing to the dissenting members of the court which decided *Continental*. Mr. Justice Holmes said:

> "Whenever a party knows that he is buying from an illegal trust, and still more, when he buys at a price that he thinks unreasonable, but is compelled to pay in order to get the goods he needs, he knows that he is doing an act in furtherance of the unlawful purpose of the trust, which always is to get the most it can for its wares. But that knowledge makes no difference, because the policy of not furthering the purposes of the trust is less important than the policy of preventing people from getting other people's property for nothing when they purport to be buying it. . . . In this case, however, the defendant was an unwilling accessory, exactly as Dee was in the *Connolly Case*." (212 U.S. at 270-71).

Mr. Justice Brewer, agreeing with Mr. Justice Holmes, also dissented separately on the ground that, as the Court had said before and has repeated since, the penalties imposed by the Sherman Act are exclusive and leave no room for the imposition by the courts of additional civil sanctions.

We leave it to this Court to determine whether the *Continental* case is distinguishable on the grounds suggested or is a temporary aberration from the sound principle which the Court has applied in all its other decisions. In either event, there is no possible basis in that decision for the petitioner's claim that the defense of

illegality should be reserved for guilty participants. In either event the judgment enforcing the contract in the case at bar should be affirmed.

By way of final comment on *Continental,* we note the passage in which the Court said: "To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum." (212 U.S. at 263). This statement, we suggest, was made at a time when the Court was relatively confident of its ability to foretell the effects of rules of law on human behavior. We regret that we can cite the Court to no empirical study of the effects of the supposed rule of the *Continental* case on the number of illegal bargains which are contracted. We respectfully doubt, however, that such a study could show that the denial of a remedy against the buyer, as distinct from the sanctions provided by the Sherman Act itself, has a material deterrent effect. The existence of the rule (if it does exist as assumed) did not prevent the formation of the contract here in suit, for instance—for the very good reason that the seller, at least, obviously had no idea that the parties were committing an illegal act (if they were), or, at the least, the seller was not aware of this assumed legal consequence of the assumed illegality. Given knowledge of the assumed illegality and its assumed consequences, no seller in his right mind would have extended credit, as respondent did. In a time when multitudinous regulations make unlawful acts which are only *mala prohibita,* illegality is not a factor which is likely to be apparent to a group of onion growers and traders at a conference to consider a critical market condition; it is much more likely to be a factor introduced after the event, and after prolonged study by lawyers.

for a purpose which petitioner himself characterizes as dishonest. Moreover, if it is assumed that the risk of illegality is somehow present to the minds of the parties —or one of them—the only statement that can be safely made is that one of them may be deterred from entering into the agreement by the fact that illegality is available as a defense. The *seller* might be deterred; but the rule (if there is such a rule) authorizing the defense is a positive inducement to the buyer to make a contract such as was made in this case, since he is thereby enabled to speculate at the risk of the seller. Having bought the onions at their fair market value, he is safe if the price remains stable, and he profits if the price goes up. If, as happened in the present case, the market price declines, he need not suffer the loss, but may simply wash his hands of the matter and thereby shift the loss to the seller.

In this connection we cannot avoid reference to the petitioner's startling contention (Brief, 25-26, fn. 6) that he realized no windfall—no unjust enrichment—for the reason that the portion of the price which he paid was sufficient to cover the thirteen cars which he elected to withdraw from storage under the contract. In the first place, his arithmetic is wrong. Thirteen cars at $960 per car amount to $12,480—only twenty dollars less than the partial payment which was made—and this computation takes no account of the fact that respondent incurred for petitioner's account storage expenses totalling $5,082. Even on petitioner's strange theory of accounting, all but $20 of the storage charges attributable to the thirteen cars withdrawn is out-of-pocket expense to respondent and unjust enrichment to the petitioner. But this does not go to the heart of the matter, which is that the entire argument in the footnote is a stark and reprehensible at-

tempt to confuse the issue. On the making of the contract petitioner acquired title to specific and designated lots of onions in specific storage locations (R. 7). See *Smith-Hurd Illinois Rev. Stat.* c. 121½, Secs. 18, 19; *Collins* v. *Oliver,* 299 Pa. 372, 149 Atl. 647, 649 (1930). This was on December 17, 1955. As late as February 20 of the following year petitioner acknowledged the agreement (R. 10). During all this time the onions were his own, and he treated them as his own. He had the complete power to dispose of them as he pleased. If he chose to speculate, allowing the onions to rot in storage while he waited for higher market prices which did not come, this Court will certainly not be deceived when he assumes a mask of piety and has the effrontery to pretend that he has paid for what he got.

Assuming that the prospective seller of goods is aware of the possible illegality of one of the terms of sale, it may well be that he would be deterred from entering into the transaction by the strong penalties imposed by the Sherman Act itself. If those penalties do not deter him, it is difficult to understand how he would be deterred by the prospect of judicial imposition of the cumulative civil penalty of loss of remedy for the price, even if he is aware that such would be a consequence of the illegality. This is especially true since, as this Court pointed out in *Bruce's Juices,* the seller has only to refuse credit in order to escape entirely the force of this additional judicial sanction. Of itself, such a sanction has no logical tendency to inhibit illegal transactions, but only to inhibit credit transactions.

The only reason that has ever been advanced for denying the seller his remedy for the price is that the policy of inhibiting illegal transactions is thereby advanced. Even if denial of the remedy did produce this result, the

consequences of the rule would be too great a price to pay for the gain: for the consequences are to enable unscrupulous buyers to enrich themselves unjustly, to obtain the property of others without payment, to capitalize on their own infamy, to speculate at the risk of another and to exact "legal blackmail" (note, 47 Colum. L. Rev. 867, 869 (1947))—all with the aid and encouragement of the courts and the law. When it is recognized, as this Court has recognized, that the rule in fact does not tend to produce the imagined result of inhibiting illegal transactions, but only to inhibit credit transactions, bearing most heavily upon the necessitous buyer, it should be overwhelmingly obvious that there is no justification whatever for employing a rule which produces such odious results. Certainly the allowance of the defense in such circumstances cannot advance the policy of the Sherman Act.[5]

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[5] The legislative history of the federal antitrust acts demonstrates that Congress repeatedly rejected provisions of bills which would have authorized violations of the antitrust laws to be asserted as a defense in a civil action. Seven of the bills introduced in the same month as the Sherman Act contained provisions to that effect: Bills and Debates in Congress relating to Trusts (1903), Senate Document 147, 57th Cong., 2nd Session. None of these provisions was adopted or even brought to a vote. When the Clayton Act was adopted, Congress rejected a proposal by Senator La-Follette which would have authorized such a defense: S 191, S 2552, 63rd Cong., 1st Session. By contrast, in several instances state antitrust legislation enacted in the same period provided that the purchaser from a violator could prove the violation as a complete defense to an action for the contract price. See Lockhart, Violation of the Antitrust Laws as a Defense in Civil Actions, 31 Minn. L. Rev. 507, 508-09 (1947).

III.

ASSUMING THAT THE NON-DELIVERY PROVISION WAS UNLAWFUL, AND FURTHER ASSUMING THAT IN CONSEQUENCE THE DEFENSE OF ILLEGALITY IS AVAILABLE TO THE BUYER IN AN ACTION ON THE CONTRACT TO RECOVER THE AGREED PRICE, THE SELLER IS NEVERTHELESS ENTITLED TO RECOVER THE REASONABLE VALUE OF THE GOODS SOLD, AND IT IS NOT DENIED THAT THE CONTRACT PRICE IS ITSELF THE REASONABLE VALUE.

The four dissenting justices in *Bruce's Juices*, while contending that the defense of illegality should be available to the defendant with respect to recovery of the contract price, including its illegal component, nevertheless positively affirmed the right of the seller to recover on a *quantum meruit* basis:

> "If the petitioner [buyer] were to prevail in this case and the promissory notes were to be declared unenforceable, respondent [seller] would still be free to recover on a *quantum meruit* basis if it has not already so recovered. See *Penn-Allen Cement Co.* v. *Phillips*, 182 N.C. 437, 109 S.E. 257." (330 U.S. at 759).

The Court in the *Continental Wall Paper* case implied the same position:

> "The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased . . ." (212 U.S. at 261).

All nine members of the Court in *Bruce's Juices* were agreed on the proposition that in any event the seller was entitled to recover, and the buyer was required to pay, the reasonable value of the goods sold and delivered, notwithstanding the taint of illegality and notwithstanding

a possible defense to the demand for the contract price as such.[6]

In the case at bar the price of $960 per car was the going market price for onions. There has never been the slightest suggestion that that price was anything other than the fair and reasonable value of the commodity at the time of sale. The storage charges are the actual out-of-pocket expenses incurred by the seller for the buyer's account, and no suggestion has been or can be made that they were other than fair and reasonable. Of course, under the Federal Rules of Civil Procedure the respondent was not required to plead the "common counts," but is entitled to recover the reasonable value on the complaint as it stands. (Rule 8(a).) It follows that a reversal of the judgment for the contract price would be a pointless formality, since that judgment should in that event immediately be replaced by another, in the identical amount, representing the reasonable value of the goods sold plus storage charges.

The principle that the seller is entitled at least to the reasonable value of the goods notwithstanding the taint of illegality is in line with the most enlightened views of other courts see *Rosasco Creameries, Inc.*, v. *Cohen*, 276 N.Y. 274, 11 N.E. 2d 908 (1937) and of legal scholars. Professor Page said of the early common law rule, denying recovery even on a *quantum meruit* basis:

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[6] It is true that the majority of the Court, assumed that, if illegality were a defense to the claim for the contract price, recovery on the basis of quantum meruit would not be available. 330 U.S. at 748, note 1. Nevertheless, the fact remains that all members of the Court concurred in the view that the plaintiff should recover either the contract price or the reasonable value. Cf. Lockhart, Violation of the Anti-Trust Laws as a Defense in Civil Actions, 31 Minn. L. Rev. 507, 543 (1947).

> "In contracts of this sort the more adroit of the two parties who is likely to be the habitual law breaker, secures performance by the adversary party in advance; and the effect of applying this rule is therefore to secure immunity to the habitual law breaker." (2 Page, The Law of Contracts, Sec. 1061 (1920).)

And Professor Wigmore said:

> "But the whole notion is radically wrong in principle and produces extreme injustice. If A owes B $5,000, why should he not pay it whether B has violated a statute or not? . . . [T]he doctrine now under consideration requires, with monstrous injustice and blind haphazard, that the plaintiff shall be mulcted in the amount of his right, whatever that may be." (Wigmore, A Summary of Quasi-Contracts, 25 Amer. L. Rev. 712, note (k) (1891).)

See also 6 Corbin on Contracts Sec. 1534, p. 1057 (1951); Gellhorn, Contracts and Public Policy, 35 Column. L. Rev. 679 (1935); Wade, Restitution of Benefits Acquired Through Illegal Transactions, 95 U.Pa. L. Rev. 261 (1947).

CONCLUSION.

For the reasons heretofore stated, we respectfully submit that (a) the writ of certiorari should be dismissed or (b) that the judgment should be affirmed on the ground that the alleged illegality is not a defense to an action for the contract price or (c) that the judgment should be affirmed on the ground that the alleged illegality is not a defense to an action for the reasonable value of the goods sold, which, in this case, is the same as the contract price.

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January 5, 1959

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 267

JACK H. KELLY,
Petitioner,
vs.
VINCENT W. KOSUGA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Now comes the petitioner, Jack H. Kelly, by his attorneys, Joseph W. Louisell and Ivan E. Barris, and respectfully petitions this Honorable Court to re-hear the instant appeal for the following reason

BY DISREGARDING THE WELL SETTLED AND LONG ESTABLISHED PRINCIPLE OF LAW THAT A PRICE FIXING AGREEMENT IS ILLEGAL PER SE UNDER THE SHERMAN ANTI-TRUST ACT, THE OPINION OF THE COURT, IF NOT RECONSIDERED, WILL BECOME PRECEDENT FOR THE INHERENTLY DANGEROUS PROPOSITION THAT PRICE FIXING AGREEMENTS WHICH DO NOT RESULT IN UNFAIR, UNREASONABLE OR EXCESSIVE PRICES DO NOT COME WITHIN THE PROSCRIPTION OF THE SHERMAN ANTI-TRUST ACT.

The Opinion of the Court, rendered on February 24, 1959, does not overrule the earlier case of *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U. S. 227, but rather seeks to distinguish the case at bar from it upon the fallacious basis that, whereas in the former case the defense of illegality was allowed as an alternative to the Court becoming a party to the carrying out of a price fixing agreement resulting in excessive and unreasonable prices, in the present case the Court may properly enforce the promise of the petitioner to pay the agreed price, not alleged to have been excessive and unreasonable, notwithstanding the promise, as was likewise true in the *Continental* case, *supra*, was part and parcel of a price fixing scheme. It thus appears that this Honorable Court, by implication, at least, has, in sanctioning the enforcement of a price fixing agreement which did not result in unfair, excessive and unreasonable prices, overruled a long line of decisions which have universally held that price fixing agreements resulting in reasonable prices are as equally condemned by the Sherman Anti-Trust Act as are price fixing agreements resulting in unreasonable prices, the decisions being predicated upon the theory that all price fixing agreements, since they tend to stifle eco-

nomic competition, are illegal *per se*.[1] (See, by way of example, *United States v. McKesson and Robbins, Inc.*, 351 U. S. 305; *United States v. New Wrinkle, Inc.*, 342 U. S. 371, *United States v. Paramount Pictures, Inc.*, 334 U. S. 131; *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150.)

Furthermore, this Honorable Court, on several occasions in the past, in holding that a plea of illegality based upon a violation of the Sherman Anti-Trust Act may successfully be asserted by a private individual as a defense when sued upon an agreement which is violative of said Act, has so concluded without regard to whether the price fixing agreement resulted in reasonable and fair prices or unreasonable, unfair and excessive prices. (*E. Bement & Sons v. National Harrow Company*, 186 U. S. 70; *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173; *Edward Katzinger Co. v. Chicago Metallic Mfg. Co.*, 329 U. S. 394[2].) In fact, in the *Sola* case, *supra*, as well as in the *Katzinger* case, *supra*, to say nothing of the *Continental* case, *supra*, recovery upon the contract which was violative of the Sherman Anti-Trust Act was denied, notwithstanding the promise to pay was, in part, supported by

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[1] In this regard, it is submitted that the Opinion of the Court does violence to the language of Section 1 of the Sherman Anti-Trust Act, the thrust of which is directed against not some but rather *every* contract, combination or conspiracy in restraint of trade. Also to be noted is that in the landmark case of *McMullen v. Hoffman*, 174 U. S. 639, this Honorable Court laid down the sound principle, at 174 U. S. 649, that if contracts are illegal in their nature and tendency, "no inquiry is necessary as to the particular effect of any one contract, because it would not alter the general nature of contracts of this description, or the force of the public policy which condemns them".

[2] These cases were apparently not taken into consideration when it was stated in the Opinion of the Court:

> "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court."

legal consideration, for the announced reason, as was stated in the *Katzinger* case, *supra,* at 329 U. S. 401, that "when one part of the consideration is unenforceable because in violation of law, its integrated companion must go with it", citing *Hazelton v. Sheckels,* 202 U. S. 71.

Inasmuch as the Opinion of the Court fails to advert to any of the above cited cases, except the *Continental* case, *supra,* which the Court attempts to distinguish, and the *Sola* case, *supra,* which is merely cited for the proposition that the effect of illegality under a federal statute is a matter of federal law, and inasmuch as the legal proposition for which these cases have long stood is, without question, the most firmly established in the entire field of Anti-Trust law, counsel for the petitioner are constrained to believe that the present Opinion is the product of this Honorable Court's inadvertent failure to assess the significance of the impact of the rationale of these cases upon the case at bar. It is therefore respectfully urged that, under the foregoing circumstances, to allow the judgment to remain undisturbed would not only result in a manifest injustice to the petitioner, but would also, as a precedent, encourage the future execution of price fixing agreements, with all of their attendant economic evils which the Sherman Anti-Trust Act, as enacted and as interpreted by this Honorable Court, was designed to combat.

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CERTIFICATE OF COUNSEL

Ivan E. Barris, one of the counsel for the petitioner, Jack H. Kelly, does hereby certify that the above petition for re-hearing is brought in good faith and not for delay.

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